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IN THE Supreme Court of the United States

OCTOBER TERM, 2001

KATIE ARSBERRY, PHYLLIS BROOKS, JEANNE GAMMON, GUADALUPE GIRON, WILLIE MAE HAGGARD, LINDA GOODMAN, CAROLYN HAWTHORNE, SUSAN HAZELY, MARY HIGH, AKUA HOPE, ARLENE JOHNSON, ANTHONY MALTESE, SANDY MARKIEWICZ, CATHERINE NYSTROM, ANNIE ROSS, JAMILLAH FIELDS, BERENETTA GLASS, JUNE DYLLA, ELIZABETH STEWART, MIDWEST CENTER FOR JUSTICE, LTD., LONNIE ARSBERRY, MAYA HAGGARD, JOHN HIGH, JOHN MARKIEWICZ, RODNEY NYSTROM, NATHSON FIELDS, CHRIS BROWN, JOHN BELOW, JUSTIN WILCOX, and MARY WEEKLY, on behalf of themselves and all others similarly situated,

Petitioners,

-v.-

STATE OF ILLINOIS, MICHAEL S. SCHWARTZ, Director, Central Management Services, DONALD N. SNYDER, Director, Illinois Department of Corrections, COOK COUNTY, DUPAGE COUNTY, KANE COUNTY, AMERITECH SERVICES, INC., AT&T, INVISION TELECOM, MCI TELECOMMUNICATIONS CORPORATION, and CONSOLIDATED COMMUNICATIONS PUBLIC SERVICES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SEVENTH CIRCUIT COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals' unprecedented holding that inmates have no First Amendment rights to telephone access because it is extremely rare for inmates and those whom they call to use the telephone to convey communications protected by the First Amendment is consistent with this Court's prior First Amendment and Prisoners' Rights decisions?

2. Whether the Circuit Court of Appeals' refusal to consider the First Amendment rights of free citizens, including inmates' families, friends, ministers, and counsel, to communicate and associate with inmates by telephone -- in addressing a challenge to the financial burdens imposed by the present inmate telephone system in Illinois -- is consistent with this Court's decision in *Procunier v. Martinez*?

PARTIES BELOW

The parties before this Court are petitioners Katie Arsberry, Phyllis Brooks, Jeanne Gammon, Guadalupe Giron, Linda Goodman, Willie Mae Haggard, Carolyn Hawthorne, Susan Hazely, Mary High, Akua Hope, Arlene Johnson, Anthony Maltese, Sandy Markiewicz, Catherine Nystrom, Annie Ross, Jamillah Fields, Brenetta Glass, June Dylla, Elizabeth Stewart, Midwest Center for Justice, Ltd., Lonnie Arsberry, Maya Haggard, Nathson Fields, John High, John Markiewicz, Rodney Nystrom, Chris Brown, John Below, Justin Wilcox, and Mary Weekly, on behalf of themselves and all others similarly situated, and respondents State of Illinois, Michael S. Schwarz, as Director of Central Management Services, Donald N. Snyder, as Director of Illinois Department of Corrections, Cook County, Dupage County, Kane County, Ameritech Services, Inc., AT&T, Invision Telecom, MCI Telecommunications Corporation, and Consolidated Communications Public Services, Inc. Since this action was initiated, one of the respondents has changed its name to MCI Worldcom, Inc. from MCI Telecommunications Corporation. Invision Telecom's successor in interest is Evercom Systems, Inc.

RULE 29.1 STATEMENT

Pursuant to Rule 29.1, petitioners inform the Court that they have no parent companies and no subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Katie Arsberry, *et al.* respectfully submit this petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in *Arsberry v. State of Illinois*, filed on March 19, 2001.

OPINIONS BELOW

The United States Court of Appeals for the Seventh Circuit modified and affirmed the judgment of the United States District Court for the Northern District of Illinois dismissing the complaint. The Seventh Circuit's opinion is reported at 244 F.3d 558 (7th Cir. 2001), and is reprinted in the Appendix hereto at A42 - A53. The district court's opinion is reported at 117 F. Supp. 2d 743 (N.D.Ill. 2000), and is reprinted in the Appendix at A37 - A41. The Seventh Circuit denied petitioners' petition for rehearing with suggestion for rehearing *en banc* on May 29, 2001. The denial of rehearing is not reported, and is reprinted in the Appendix at A55.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit from which petitioners seek review was issued on March 19, 2001. The Court of Appeals denied a timely petition for rehearing with suggestion for rehearing *en banc* on May 29, 2001. This petition is being timely filed within 90 days of that denial.

The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The texts of the First Amendment and the Fourteenth Amendment, Section 1, to the United States Constitution, as well as the text of 42 U.S.C. § 1983 are set forth in the Appendix at A56 - A57.

STATEMENT OF THE CASE

1. Factual Background

This petition arises from a constitutional and statutory challenge to the creation and operation of exclusive dealing contracts between telephone companies and state and county corrections departments in the State of Illinois under which telephone companies like AT&T, MCI Worldcom, and others, are given exclusive privileges to provide telephone service at one or more correctional facilities in exchange for the payment of large "signing bonuses" and "commissions." (A12)

These contracts are not unique to Illinois. Across the country, state and county corrections departments have entered into similar exclusive dealing contracts with private telephone companies for the provision of inmate telephone services. Telephone companies vie for these contracts because they offer access to a high volume system of literally captive customers -- inmates -- over which these companies can maintain monopoly control and thereby ensure high profits. To secure exclusive privileges to provide telephone service to inmates at particular facilities, telephone companies agree to pay corrections departments signing bonuses and commissions up to 50% of the gross annual revenue derived from inmate-initiated calls. Over the past several years, corrections departments in Illinois have collected in excess of $15 million per year in commissions from the telephone companies to which they have awarded exclusive privileges. (A12)

In Illinois, as in the vast majority of jurisdictions in the country, corrections departments sharply limit and tightly regulate telephone usage by the individuals who are incarcerated in the facilities they operate. Under the Illinois inmate telephone system, inmates may not receive telephone calls. While they may place telephone calls, they must do so on a collect-call only basis. Moreover, they may only place such

collect calls through the telephone company awarded exclusive privileges to provide telephone service to the correctional facility in which they are incarcerated. (A12)

To pay the exorbitant commissions demanded by corrections departments and to ensure high profits for themselves, telephone companies charge significantly more for the collect calls placed by inmates than they charge for collect calls placed by the general public. Family members, friends, ministers, counselors, and others who accept calls from inmates ("inmate call recipients") thus must pay considerably more than those who accept collect calls from other sources. In addition to excessive per minute charges, inmate call recipients are subjected to excessive surcharges and connection fees for each call placed. The rates charged to a person accepting a collect call from an inmate in Illinois are thus among the highest, if not the highest, for any type of telephone service available nationally, well in excess of charges generally available to the public for comparable services. (A12 - A13)[1]

Under the single provider/collect-call only system in effect in correctional facilities in Illinois and elsewhere, neither inmates nor call recipients can shop around for lower priced telephone service. They cannot choose their company. Nor can they switch to "800" or "888" numbers, dial-around savings plans, or calling cards to avoid paying the excessive rates that they pay under the present system. (A13)

There are a number of alternatives to the single-

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[1] For example, a call recipient accepting a typical long-distance call from a prison must pay an initial "surcharge" averaging $3 a call (and in some cases nearly $5), and a charge thereafter as high as 60 cents per minute. Thus, a three-minute call can range from $3.50 to $7.00. (Record in the Seventh Circuit ("R."), 62 at 15-16; *see, e.g.*, R. 40 at AM3O, A23-29).

provider/collect-call only system in effect in Illinois which would impose far less of a financial burden on inmates and inmate call recipients while concomitantly meeting legitimate security concerns at no additional cost to corrections departments. The Federal Bureau of Prisons, for example, uses a debit account system under which the cost of inmate calls is only fifteen cents per minute.[2] Corrections departments in Illinois, however, refuse to consider these alternatives.

Needless to say, the excessive charges – in effect, taxes – under the single provider/collect-call only system and commission policy sharply limit the duration and number of telephone calls that inmates may make and that family, friends, ministers, and counselors can afford to accept. For the many individuals seeking to maintain their relationships with people currently incarcerated in state and county facilities, this system places an unlawful and unjustifiable burden on their constitutionally guaranteed rights to freedom of speech and association.

B. Procedural History

Petitioners are the families, friends, ministers, counselors, attorneys of, and other persons who have close relationships with, individuals incarcerated in the prisons of the State of Illinois and in the jails of Cook, DuPage, and Kane Counties in Illinois. They are also inmates currently incarcerated in those correctional facilities. Petitioners brought this action against respondents telephone companies and corrections departments in April 1999, alleging that the exclusive dealing contracts establishing the single provider/collect-call only system and commission policy violated their rights to freedom of speech and association, and due process and equal protection of the laws under both the

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[2] (R. 36 at 14-16).

United States and Illinois constitutions, and violated the Communications Act, the Sherman Act, and the Illinois Antitrust Act. Petitioners also sought injunctive relief to restrain respondents from maintaining the system. (A1 - A36)

In August and September of 1999, respondents filed motions to dismiss the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim for relief. Petitioners opposed the motions on the ground, *inter alia*, that they had adequately pled First and Fourteenth Amendment claims and that this Court's prior decisions involving prisoners' rights, including *Turner v. Safley*, 482 U.S. 78 (1987), mandated an evidentiary hearing to determine whether the single provider/collect-call only system and commission policy were "reasonably related to legitimate penological interests." *Id.* at 89.

In a decision dated March 22, 2000, the district court dismissed the complaint in its entirety, concluding that petitioners' claims were non-justiciable under the filed-rate and primary-jurisdiction doctrines. (A37 - A41)

Petitioners' appeal was filed with the court of appeals in March 2000. Oral argument was heard on the appeal in December 5, 2000. By opinion dated March 19, 2001, the court of appeals modified and affirmed the district court's decision finding, *inter alia*, that petitioners' First Amendment claims lacked merit and that their remaining constitutional claims were barred by the filed-rate and primary-jurisdiction doctrines. Petitioners' petition for rehearing with suggestion for rehearing *en banc* was denied on May 29, 2001.

C. Opinions Below

The district court dismissed petitioners' case in its entirety on the grounds that all claims – constitutional and statutory – were "non-justiciable" under the filed-rate and

primary-jurisdiction doctrines. The court concluded that because all of petitioners' claims "at some level" concerned rates charged for telephone service, they must be referred to the Federal Communications Commission ("FCC") and the Illinois Commerce Commission ("ICC"). The district court rendered no opinion as to whether petitioners had stated claims upon which relief could be granted. (A37 - A41)

The Seventh Circuit modified and affirmed the district court's decision. After discussing various "jurisdictional or quasi-jurisdictional bars" to elements of petitioners' suit separate and apart from those identified by the district court (A43 - A44), the court concluded that neither the filed-rate doctrine nor primary- jurisdiction doctrine completely barred petitioners' First Amendment challenge to the exclusive dealing contracts awarded by corrections departments to telephone companies. (A44 - A48) The Seventh Circuit next proceeded to consider petitioners' claims on the merits. (A48 - A53)

In holding that petitioners failed to state a valid First Amendment claim, the Seventh Circuit opined that "no one before these plaintiffs supposed the telephone excise tax to be an infringement of free speech" (A48). The court further stated that "no one supposes" that the First Amendment exempts manufacturers of paper from the corporate income tax, or "even forbid[s] taxing those manufacturers more heavily than manufacturers of products that are less important as inputs into the production of communications media" (A48).[3]

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[3] Contrary to the Seventh Circuit's characterization of petitioners' First Amendment claim, petitioners do not challenge the telephone excise tax, but rather challenge the tax on inmate telephone service imposed as a result of the exclusive dealing contracts between corrections departments and telecommunications companies. There are crucial differences between the two taxes. While the telephone excise tax is of general applicability, the tax on inmate telephone service applies only to a select group of individuals. Morever, whereas the telephone excise tax is a

The Seventh Circuit cited but distinguished *Grossjean v. American Press Co.*, 297 U.S. 233 (1936), in which this Court invalidated a tax imposed on newspaper advertising revenues, because petitioners did not allege that the tax imposed by the contracts challenged here was motivated by a desire to limit free speech. (A48 - A49) While finding this case "a bit closer" to *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), in which this Court invalidated a special use tax imposed on a group of newspapers, the Seventh Circuit, perceived a "vital distinction":

> The entire content of newspapers, in contrast to telephone calls, is protected by the First Amendment . . . Although the telephone *can* be used to convey communications that are protected by the First Amendment, that is not its primary use and it is extremely rare for inmates and their callers to use the telephone for this purpose. Not to allow them access to a telephone might be questionable on other grounds, but to suppose that it would infringe the First Amendment would be doctrinaire in the extreme, *United States v. Footman*, 215 F.3d 145, 155 (1st Cir. 2000), though the Ninth Circuit disagrees. *Johnson v. California*, 207 F.3d 650, 656 (9th Cir. 2000). (A49).

The Seventh Circuit dismissed petitioners' remaining claims either on the merits or under the filed-tariff and primary-jurisdiction doctrines (A49 - A53).

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product of legislative debate and authorization, the inmate telephone service tax is a creature of administrative fiat.

SUMMARY OF THE ARGUMENT

This case is of significant national import not only because of its impact on the free speech and associational rights attendant to inmate telephone service, but also, more broadly, because of its impact on First Amendment protections generally.

What the Seventh Circuit has done in this case is to rewrite this Court's First Amendment jurisprudence to the extent that protection is no longer accorded to private conversations, to speech which does not solely address matters of public concern, or to communications between prison inmates and their families, friends, ministers, and counselors. No aspect of the Court's jurisprudence even hints at such conclusions. To the contrary, the Court's First Amendment decisions proclaim precisely the obverse. *See* Point I.

While reasonable minds may agree that many restrictions are appropriate and necessary during incarceration, this Court has made clear that inmates are not completely divested of their constitutional rights at the jailhouse door. As demonstrated below in Point II, the *Arsberry* court's holding that inmates possess no First Amendment right to use the telephone to communicate with those who have an interest in speaking with them conflicts with the decisions of every circuit court in the nation to address this issue.

Point III addresses the Seventh Circuit's failure to recognize that (i) inmates have First Amendment rights to telephone access; (ii) inmate call recipients possess independent free speech rights; and (iii) both inmates and inmate call recipients possess a right to freedom of association separate and apart from their right to freedom of speech. In this regard, the *Arsberry* decision directly contravenes this Court's decision in *Turner v. Safley*, 482 U.S. 78, 95-97 (1987). Given the absence of a reasonable penological justification for use of the single provider/collect-call only system and commission

policy and the tremendous burden it places on petitioners' constitutional rights, the application of the *Turner* analysis in this case mandates the conclusion that petitioners have stated a claim for violation of their rights to freedom of speech and association.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS IMPORTANT ISSUES WORTHY OF THIS COURT'S REVIEW CONCERNING THE FIRST AMENDMENT PROTECTIONS AFFORDED INMATES AND THE FAMILY MEMBERS, FRIENDS, MINISTERS, AND COUNSELORS THEY CONVERSE AND ASSOCIATE WITH BY TELEPHONE

From the start, the case has been regarded as one of significant national import. There are more than two million people incarcerated in the United States, with the vast majority held in state prisons and county jails. There is no disagreement with the principle that these facilities were designed as places for the punishment and rehabilitation of criminals, and not as profit-making enterprises. Yet, across the country, a system has developed that capitalizes on burgeoning prison populations and their families.

With very few exceptions, state and county departments which operate correctional facilities have awarded telephone companies exclusive privileges to provide inmate telephone service at their facilities in return for huge "commissions." Across the country, telephone companies now compete for such exclusive dealing contracts and agree to pay these commissions as well as signing bonuses in exchange for monopolies over inmate telephone systems. The commissions demanded by corrections departments are not intended to cover the operating

costs of inmate telephone systems – those costs are covered by the telephone companies – nor are they related in any way to telephone usage by inmates. They are in fact the profits demanded by corrections departments on the incarceration of their citizens. Yet no state legislature to date has authorized the imposition of such a tax.

These lucrative contracts have engendered a cruelly exploitative system under which the families, friends, ministers, and counselors of inmates must bear the burden of an unlegislated tax imposed on them by virtue of states' profiteering schemes. Moreover, because inmates are limited to making only collect calls, cheaper alternatives are unavailable to them. As a direct result of the commissions demanded and the bar precluding the selection of one's provider or cheaper service options, those who wish to communicate with inmates must pay exorbitant rates.

The tax on inmate telephone calls has significantly burdened families' efforts to maintain contact with loved ones who are incarcerated hundreds of miles away. For many people -- particularly for children and those who are elderly or ill -- regular travel over such distances is impossible, and telephone conversations are the only effective means of communication. (A18- A19) Yet, because of the single provider/collect-call only system and commission policy, inmate telephone service is both limited and extremely expensive. Petitioners, like the many millions of people in the same situation across the country, have had their telephones disconnected for extended periods of time because of their inability to meet this expense, causing significant family disruption. (A14 - A19) With government's entrance into the telecommunications market, the inflated "costs" of the inmate telephone system are borne by those with no options and no power to fight such powerful monopolies.

The single provider/collect-call only system and commission policy for inmate telephone service actively

discourages and prevents inmates from maintaining important ties to the outside world to which they eventually will return. In so doing, it plainly undermines the societal and correctional goals of rehabilitation and re-assimilation. More alarmingly, it unconstitutionally burdens inmates' and their families' free speech and associational rights as it does so.

In rejecting petitioners' First Amendment challenge, the Seventh Circuit disregarded this Court's unequivocal jurisprudence governing the First Amendment rights of inmates. In *Turner v. Safley*, 482 U.S. 78 (1978), this Court recognized that prisoners have First Amendment rights. Despite the clarity of the Court's decisions on these issues, *see also Shaw v. Murphy*, __ U.S. __, 121 S. Ct. 1475 (2001), and the consistent adherence to these constitutional principles in all of the lower courts, the court below squarely held that prisoners have no such rights and that no analysis is required to determine whether the single provider/collect-call only system and commission policy bears a reasonable relationship to any legitimate security or penological interest. *Arsberry*, 244 F.3d at 564-65. (A48 - A49)

The *Arsberry* decision also utterly ignored this Court's settled decisional authority holding that prisoners and their families' have reciprocal rights to familial association which survive incarceration, because attributes of the family relationship – expressions of emotional support, decisionmaking regarding family obligations and child-rearing, and expectations of the prisoner's reentry into the family – continue to exist despite the fact of imprisonment. *See Turner v. Safley*, 482 U.S. at 95-97. To the extent they restrict non-inmates' ability to communicate with family members in prison, respondents' policies burden petitioners' rights to familial and marital association protected by the First and Fourteenth Amendments.

This case has import far beyond its impact on the ongoing debate over the lawfulness of the single

provider/collect-call only system for inmate telephone service – beyond even its impact on the First Amendment rights of inmates and those on the outside seeking to communicate with them. The case also matters because the Seventh Circuit has cast in doubt the First Amendment protections afforded to private telephone calls and to private conversations generally, which account for the vast majority of speech.

The degree to which the Seventh Circuit has departed from this Court's prior First Amendment decisions warrants review by this Court. When, since *Procunier v. Martinez*, 416 U.S. 396 (1974), has a court of appeals suggested that the opportunity to write letters and have visitors extinguishes altogether any First Amendment rights inmates may have in other means of communication? When, since *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979), has a court of appeals suggested that private conversations, including private telephone calls, are unworthy of First Amendment protection? When, since *Connick v. Myers*, 461 U.S. 138 (1983), has a court of appeals suggested that the First Amendment only protects speech on matters of public concern?

For all of these reasons, this case warrants plenary review by this Court.

II. THE SEVENTH CIRCUIT'S HOLDING THAT THERE IS NO FIRST AMENDMENT RIGHT IMPLICATED IN ACCESS TO PRISON TELEPHONES DIRECTLY CONFLICTS WITH THE RULINGS OF A GREAT MAJORITY OF THE CIRCUITS

In holding that it "would be doctrinaire in the extreme" to recognize that inmates have a First Amendment right to telephone access, (A49), the Seventh Circuit has created a

conflict among the circuits which needs to be resolved. Every other circuit to consider this matter has either explicitly or implicitly recognized that inmates possess such a right.

Thus, for example, the Ninth Circuit has stated, time and again, that "prisoners have a First Amendment right to telephone access," subject to reasonable security concerns. *Johnson v. California*, 207 F.3d 650, 656 (9th Cir. 2000) (per curiam); *Keenan v. Hall*, 83 F.3d 1083, 1092 (9th Cir. 1996) (same); *Strandberg v. City of Helena*, 791 F.2d 744, 747 (9th Cir. 1986) ("Courts have recognized detainees' and prisoners' [F]irst [A]mendment right to telephone access . . . subject to rational limitations in the face of legitimate security interests of the penal institution").

Similarly, in *Washington v. Reno,* 35 F.3d 1093 (6th Cir. 1994), the Sixth Circuit held that "persons incarcerated in penal institutions retain the First Amendment rights to communicate with family and friends," upholding the district court's finding that such rights were violated by certain changes to the inmate telephone system in the federal prisons. *Id.* at 1099-1100. The Eighth Circuit too has followed suit. *See Benzel v. Grammar*, 869 F.2d 1105, 1108 (8th Cir.) (acknowledging that "prison inmates may have a [First Amendment] right to use the telephone for communication with relatives and friends, . . . subject to rational limitations in the face of legitimate security interests of the penal institution."), *cert. denied*, 493 U.S. 895 (1989); *McDonald v. Armontrout*, 908 F.2d 388, 392 (8th Cir. 1990) (noting that death row inmates have First Amendment rights to limited telephone access). The Tenth and Eleventh Circuits as well have each recognized inmates' First Amendment rights to telephone access, invoking this Court's analysis in *Turner v. Safley*, 482 U.S. 78 (1987), to consider whether various limited restrictions on inmates' telephone access abridged their freedom of speech. *Young-Bey v. Swanson*, 2001 U.S. App. LEXIS 2729 (10th Cir. 2001); *Pope v. Hightower*, 101 F.3d 1382, 1384 & n.1 (11th Cir. 1996).

While not squarely addressing sentenced inmates' First Amendment rights to telephone access, the First, Second, and Fifth Circuits have all recognized that pretrial detainees have such a First Amendment right. *Feeley v. Sampson*, 570 F.2d 364, 374 (1st Cir. 1978) ("the consensus has been in favor of at least some access" to telephone by pretrial detainees for social calls); *Wolfish v. Levi*, 573 F.2d 118, 126 (2d Cir. 1978) ("pretrial detainees enjoy a [F]irst [A]mendment right to communicate by telephone with persons outside the prison"), *rev'd on other grounds*, 441 U.S. 520 (1979); *Montana v. Commissioners Court*, 659 F.2d 19, 23 (5th Cir. 1981) ("courts have guarded against unreasonable restrictions on telephone use").[4] In addition, the Fifth Circuit has suggested that sentenced inmates enjoy First Amendment rights to at least *some* telephone access. *Lopez v. Reyes*, 692 F.2d 15, 17 (5th Cir. 1982) ("A prisoner in maximum security has no right to *unlimited telephone use*" (emphasis added)).

In sum, no doubt because "oftimes use of a telephone is essential" to inmates and their families, friends, ministers, and attorneys, *Johnson v. Galli*, 596 F. Supp. 135, 138 (D. Nev. 1984), eight circuits have recognized that sentenced inmates or

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[4] In support of its refusal (at A49) to recognize that inmates have First Amendment rights to telephone access, the Seventh Circuit cited the First Circuit's decision in *United States v. Footman*, 215 F.3d 145 (1st Cir. 2000). That case, however, did not involve a First Amendment challenge to restrictions on inmates' access to the telephone. To be sure, the First Circuit stated that "prisoners have no *per se* constitutional right to use a telephone, *id.* at 155, but it did not hold that they have no constitutional right at all to make telephone calls. Even assuming, *arguendo*, that inmates have no unabridgeable right to telephone access, that does not preclude them from having a more limited right of access to such service. *Cf. Continental T.V. v. GTE Sylvania*, 433 U.S. 36 (1977) (While non-price vertical restraints are no longer *per se* unreasonable restraints of trade, they may be unreasonable restraints of trade in particular circumstances).

pretrial detainees, or both, have First Amendment rights to telephone access, and no circuit, until now, has ruled to the contrary. The Seventh Circuit thus stands alone, and in direct conflict with the great majority of circuits, in refusing to recognize such a right.[5]

III. THE SEVENTH CIRCUIT ERRED IN REJECTING PETITIONERS' CHALLENGE TO THE SINGLE PROVIDER/COLLECT-CALL ONLY SYSTEM AND COMMISSION POLICY

A. The Seventh Circuit's Holding That Inmates Have No First Amendment Rights to Telephone Access Cannot Be Reconciled With This Court's Prior First Amendment and Prisoners' Rights Decisions

This Court has made unequivocally clear that "'prison walls do not form a barrier separating prison inmates from the protections of the Constitution,'" *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989) (quoting *Turner v. Safley*, 482 U.S. 78, 84 (1987)), and that inmates retain First Amendment rights to communicate with the outside world subject, of course, to reasonable security concerns. *Pell v. Procunier*, 417 U.S. 817, 822 (1974). While upholding various restrictions on inmate

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[5]The *Arsberry* decision stands in direct conflict not only with the majority of other circuits but also with the Seventh Circuit's own prior decisions. In *Tucker v. Randall*, 944 F.2d 388 (7th Cir. 1991), the Seventh Circuit declared that "unreasonable restrictions on prisoner's telephone access may ... violate the First and Fourteenth Amendments." *Id.* at 390. And, in *Duran v. Elrod*, 542 F.2d 998 (7th Cir. 1976), it held that the plaintiff inmates had stated "a claim of denial of due process" in alleging a "lack of sufficient telephones" to communicate with the outside world. *Id.* at 999-1000. In holding here that inmates have no First Amendment right to telephone access, the Seventh Circuit never acknowledged, let alone addressed, its prior rulings on the issue, even though petitioners brought those rulings to the court's attention.

communications with families, friends, and loved ones, the Court has never suggested, let alone held, that the availability of some means of communications with the outside world, such as letters or visits, extinguishes altogether any First Amendment rights that inmates may have to use other means of communication. Indeed, the Court has implied the exact opposite. *Pell v. Procunier*, 417 U.S. at 823-24 (the availability of alternative means of communication, though a relevant factor, "does not extinguish altogether" an inmate's "constitutional interest" in other means of communication).

In holding nonetheless that inmates lack First Amendment rights to telephone access, the Seventh Circuit inexplicably assumed (at A49) that "it is extremely rare for inmates and their call[ees] to use the telephone" to convey communications protected by the First Amendment. That assumption not only disregards this Court's prior pronouncements on prisoners' rights but also flies in the face of its prior First Amendment decisions in other contexts. Furthermore, it is made without the careful factual analysis the subject, and this Court, demand.

The simple fact that inmates engage in private conversations rather than issue public declarations when they call their families, friends, and loved ones does not deprive those telephone calls of First Amendment protection. "The First Amendment forbids abridgment of the 'freedom of speech.' Neither the Amendment itself nor our decisions indicate that this freedom is lost to [one] who arranges to communicate privately . . . rather than to spread his views before the public." *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 415-16 (1979) (statements made by public school teacher in private conversations with school principal protected by First Amendment). To suggest otherwise, as the Seventh Circuit does, would be to exclude the vast majority of speech from First Amendment protection.

Nor does the specific content of inmates' telephone conversations with families, friends, and loved ones somehow place their calls outside the boundaries of First Amendment protection. Speech on matters of public concern, of course, "lies at the heart of the First Amendment's protection." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978) (citing *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940)). During their conversations, inmates and their callees doubtless regularly discuss matters of public concern, including, most notably, prison conditions and the criminal justice system, even if only because those matters are also of private concern to inmates and their families, friends, and loved ones. *Cf. Procunier v. Martinez*, 416 U.S. at 408 (implying that inmates' written correspondence often include grievances and complaints about prison conditions). "The private nature of [these conversations] does not vitiate the status of [such discussions] as addressing . . . matter[s] of public concern." *Rankin v. McPherson*, 483 U.S. 378, 387 n.11 (1987). Moreover, as this Court has observed, inmates may choose to "communicate with the press" on matters of public concern "through their families, friends, clergy, or attorneys." *Pell v. Procunier*, 417 U.S. at 825.

To be sure, inmates also discuss matters of purely private concern in telephone calls to their families, friends, and loved ones. The First Amendment, however, "'does not protect speech and assembly only to the extent it can be characterized as political. Great secular causes, with smaller ones, are guarded.'" *Connick v. Myers*, 461 U.S. 138, 147 (1983) (quoting *Mine Workers v. Illinois Bar Ass'n*, 389 U.S. 217, 223 (1967)). While speech on matters of purely private concern may have less constitutional value than expression on matters of public concern, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760 (1985), it still is entitled to First Amendment protection. *Connick v. Myers*, 461 U.S. at 147.

In sum, the Seventh Circuit's holding that inmates have no First Amendment rights to telephone access not only

disregards this Court's prior pronouncements on prisoners' rights, but also cannot be reconciled with the Court's prior First Amendment decisions in other contexts – decisions that all but mandate recognition of inmates' First Amendment rights to telephone access. To borrow the Seventh Circuit's own words (at A49), it is "doctrinaire in the extreme" to suggest otherwise.

B. The Seventh Circuit Failed to Recognize That the Single Provider/Collect-Call Only System and Commission Policy Implicate the First Amendment Rights of Not Only Inmates But Also Their Families, Friends, and Loved Ones

It is well settled that restrictions on *written* correspondence between inmates and the outside world implicate the First Amendment rights not only of inmates but also of those on the outside with whom they correspond. *Procunier v. Martinez*, 416 U.S. at 409. This is so regardless of "whether the nonprisoner correspondent is the author or intended recipient of a particular letter, for the addressee as well as the sender of direct personal correspondence derives from the First and Fourteenth Amendments a protection against unjustified governmental interference with the intended communications." *Id.* at 408-09. Thus, the wife of an inmate who receives only a censored letter from her incarcerated husband "suffer[s] an abridgment of her interest in communicating with him as plain as that which results from censorship of her letter to him." *Id.* at 409. Her First Amendment right in communicating with her husband exists independently of, and is not derivative of, her husband's First Amendment interest in communicating with her. *Id.*

Similarly, the single provider/collect-call only system and commission policy at issue here implicates the First Amendment rights of both inmates and those whom they call.

Like a written letter, a telephone call is "a particular means of communication in which the [First Amendment] interests of both parties [to the communication] are inextricably intertwined." *Id.* Just as correspondence by letter "is effected only when the letter is read by the addressee," *id.* at 408, so too a telephone call is effected only when the caller speaks with the callee. While inmates initiate calls to the outside world (because prison rules prohibit outsiders from calling them), the telephone conversation is *two-way*, as both caller and callee speak during the conversation. Thus, when prison authorities impose a steep tax on inmates' telephone calls, as they have done here, not only inmates but also their families, friends, and loved ones suffer abridgment of their First Amendment interests. Indeed, because they pay the telephone bills, the families, friends, and loved ones, typically bear the brunt of the cost of the tax.

The single provider/collect-call only system and commission policy violate not only families, friends, and loved ones' freedom of speech under the First Amendment but also their fundamental right of familial association under both the First and Fourteenth Amendments. The right to form and maintain family relationships is, of course, "a fundamental element of personal liberty" tied to the First Amendment's freedom of association. *Roberts v. United States Jaycees*, 468 U.S. 609, 618-20 (1984). Moreover, because "[i]t is through the family that we inculcate and pass down many of our cherished values," *Moore v. City of Cleveland*, 431 U.S. 494, 503-04 (1977), the Fourteenth Amendment protects "[t]he integrity of the family unit." *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). It is now well-settled that, "[m]any important attributes" of the family relationship survive incarceration. *Turner v. Safley*, 482 U.S. at 95. For this reason, the Court, in *Turner*, specifically recognizing the importance of maintaining familial and marital relationships between prisoners and their loved ones, struck down a prison restriction on an inmate's right to marry, and stated that such relationships form the basis of this fundamental

constitutional right, which can be denied only after a factual inquiry is made. *Id.* at 94-96.

In rejecting petitioners' challenge to the single provider/collect-call only system and commission policy, the Seventh Circuit ignored altogether the First and Fourteenth Amendment rights of inmates' families, friends, and loved ones. Even though such individuals were the lead plaintiffs in this litigation, and even though petitioners vigorously argued that the commission policy abridged these plaintiffs' constitutional rights, there is not a single word in the decision below acknowledging, let alone addressing, those rights.

C. Petitioners Have Stated a Valid Claim That the Single Provider/Collect-Call Only System and the Commission Policy Violate Their First and Fourteenth Amendment Rights

On a motion to dismiss for failure to state a claim for relief, the well-pleaded factual allegations of a complaint must be accepted as true and construed in the light most favorable to the plaintiff. *Papasan v. Allain*, 478 U.S. 265, 283 (1986). Dismissal may be granted only if, taking the plaintiff's averments as true and construing them most favorably to the plaintiff, the district court nonetheless concludes that the plaintiff has failed to state a claim on which relief may be granted. *Id.*

Because it held that inmates have no First Amendment rights to telephone access and because it ignored the First (and Fourteenth) Amendment rights of their families, friends, and loved ones, the Seventh Circuit never considered whether the single provider/collect-call only system and commission policy survive constitutional scrutiny. Under this Court's established analysis and that of circuit courts evaluating prison rules, it is clear that the system and policy pose First Amendment problems.

To begin, the constitutionality of respondents' systems is not governed by the deferential standard adopted by this Court in *Turner*. In that case, the Court limited judicial scrutiny of the "day-to-day" decisions of prison administrators and official efforts to address "security problems," 482 U.S. at 89, and to prison rules regulating "the order and security of the internal prison environment" in *Thornburgh v. Abbott*, 490 U.S. at 407. Courts have expressly declined to apply *Turner* to prison policies that do not implicate such concerns. Thus, in *Pitts v. Thornburgh*, 866 F.2d 1450 (D.C. Cir. 1989), the D.C. Circuit applied traditional intermediate scrutiny to the District of Columbia's decision to incarcerate long-term female offenders in federal prisons far from the city while similarly situated male offenders were incarcerated nearby. *Id.* at 1453. The D.C. Circuit reasoned that *Turner* was applicable only to cases involving "regulations that govern the day-to-day operation of prisons and that restrict the exercise of prisoners' individual rights within prisons." *Id.* at 1454. Because the District's policy was the result of "general budgetary and policy choices" that "[did] not directly implicate either prison security or control of inmate behavior, [or] go to the prison environment and regime," the Court concluded *Turner* was inapposite. *Id.* Because respondents' single provider/collect-call only system reflects a purely "budgetary" choice that does not implicate prison security, control of inmate behavior, or the internal prison environment and regime, it is subject to the level of scrutiny "traditionally applied" to challenges to fees that burden First Amendment rights. *Pitts*, 866 F.2d at 1453. *See also Beauchamp v. Murphy*, 37 F.3d 700, 704 (1st Cir. 1994) (refusing to apply *Turner* deference to inmates' challenge to correctional authorities' denial of sentencing credit because considerations of discipline and security are "greatly diluted when the issue is the calculation of a sentence, a task performed by an administrator with a pencil"); *Jordan v. Gardner*, 986 F.2d 1521, 1530 (9th Cir. 1993) (declining to apply *Turner* standard to inmates' Eighth Amendment challenge to cross-gender clothed body searches).

Even under the Court's *Turner* analysis, however, it is amply clear that petitioners have stated a valid First Amendment claim.[6] In *Turner*, this Court declared that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." 482 U.S. at 89. The Court identified the following four factors as relevant to determining the reasonableness of prison restrictions on inmate communications: (1) "whether there is a valid, rational connection between the prison regulation and the legitimate governmental interest set forth to justify it;" (2) whether there are alternative means of exercising the right that remain open to prison inmates;" (3) the impact accommodation of the asserted constitutional right will have on guards and other inmates, and the allocation of prison resources generally;" and (4) the presence or absence of "ready alternatives" that would "fully accommodate" inmates' rights "at *de minimis* cost to valid penological interests." *Id.* at 90-91. All four factors favor petitioners in their challenge to the single provider/collect-call only and commission policies.

First, petitioners have alleged that there is no "valid, rational connection" between the commission policy and legitimate penological objectives. 482 U.S. at 90. Indeed, petitioners have alleged that there is *no relation at all* between the policy and those objectives. The sole purpose of the commission policy quite evidently is to raise revenues for the State of Illinois and its counties by imposing an onerous tax on inmates' families, friends, and loved ones. While imposing disciplinary surcharges on inmates who have committed prison

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[6] The *Turner* analysis requires fact-finding and the creation of an evidentiary record. *See, e.g., Shimer v. Washington*, 100 F.3d 506, 509-10 (7th Cir.-1996); *Kikimura v. Turner*, 28 F.3d 592, 599 (7th Cir. 1994). The district court here utterly disregarded these requirements.

infractions may sometimes serve valid penological objectives, *Allen v. Cuomo*, 100 F.3d 253, 261 (2d Cir. 1996), taxing their families, friends and loved ones, who have never been convicted of any crimes, does not.

Second, petitioners have alleged that for those among them who due to age or disability cannot read or write letters or travel from home to prison, there are no practicable "available alternative means" of communication with their family members, friends, and loved ones who are incarcerated in distant prisons. *Id.* at 89. Petitioners have also alleged that telephone communications are the only available means of communication in dealing with emergency matters requiring immediate attention.

Third, petitioners have alleged that because the single provider/collect-call only system is totally unrelated to legitimate penological objectives, its removal to accommodate petitioners' First Amendment rights will have no impact whatsoever on prison administration.[7] *Id.* at 90.

Finally, petitioners have alleged "the existence of obvious, easy alternatives" to the present single provider/collect-call only system with its steep surcharge on inmate telephone calls – a debit system like that utilized by the Federal Bureau of Prisons, for example – would meet all legitimate security concerns. *Id.* at 90.

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[7] Indeed, little, if any, part of the commissions demanded by the government agencies is used to defray the costs of the inmate telephone service; those costs are paid for by the telephone companies. Nor are the commissions used for the care and custody of prisoners during their incarceration; instead the governmental agencies use their commissions to augment their general budgets.

CONCLUSION

For all of the foregoing reasons, petitioners respectfully request that the Court grant this petition.

Dated: New York, New York
August 27, 2001

Respectfully Submitted,

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APPENDIX A

SECOND AMENDED COMPLAINT

PRELIMINARY STATEMENT

This is a class action lawsuit brought, inter alia, by the family members of Illinois prisoners and Cook, DuPage and Kane County jail prisoners to enjoin, declare illegal, and to recoup damages resulting from, several conspiracies between five major telephone companies and the State of Illinois and/or Cook, DuPage and Kane County to create exclusive agreements for inmate telephone service which require prisoners to make only collect calls and result in the recipient of all inmate call being charged excessive rates and surcharges. These agreements provide for huge monetary "bonuses" to be paid by the telephone companies to the State and the above mentioned counties for obtaining the exclusive franchise for telephone service at each prison or jail and a percentage of the telephone revenues, up to 50%, generated by the inmate collect calls. The agreements are in violation of the Sherman Act, Telecommunications Act, the First, Fifth, and Fourteenth Amendments and Article 1, 9 10 of the United States Constitution, the Illinois Constitution and the Illinois Antitrust Act.

JURISDICTION

1. Jurisdiction for the constitutional claims is confirmed upon this Court by 28 U.S.C. §§ 1331 and 1343(3) and (4) and under 42 U.S.C. § 1983.

2. Plaintiffs' claims for declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure.

3. Jurisdiction for plaintiffs' antitrust claims are conferred under the Sherman Act, 15 U.S.C. §§ 1 and 15.

4. Jurisdiction is also conferred under the Telecommunications Act of 1966, 21 U.S.C. § 151 et seq. Section 207 permits persons injured by any violation thereunder to file suit in the United States District Court, and § 206 allows for the recovery of damages and attorney fees.

5. Plaintiffs further invoke this Court's supplemental jurisdiction, pursuant to 28 U.S.C. § 1367(a) over any and all state constitutional and law claims so related to the claims within the original jurisdiction of this Court that they form part of the same case or controversy.

VENUE

6. Venue is proper for the United States District Court for the Northern District of Illinois pursuant to 28 U.S.C. §§ 1391(a), (b) and (c).

JURY DEMAND

7. Plaintiffs demand trial by jury in this action on each and every one of their claims as alleged herein.

PARTIES

Families, Lawyers and Other Bill Payer Plaintiffs

8. Plaintiff, KATIE ARSBERRY, is a resident of Chicago, Illinois. Her husband is presently incarcerated at the Stateville correctional facility, operated by the defendant, STATE OF ILLINOIS (hereafter, the State). At the present time, and at all times, the only way plaintiff has been able to communicate by telephone with her husband has been to accept collect calls which are placed by him and billed to plaintiff by the telephone

company which is a party to an exclusive dealing contract governing telephone service by inmates made at the correctional institution in which he is incarcerated. Plaintiff has been billed by defendant, AMERITECH SERVICES, INC. (hereafter, Ameritech), for such calls.

9. Plaintiff, PHYLLIS BROOKS, is a resident of Cook County. Her daughter is incarcerated at Logan Correctional Center and at other times has been incarcerated at Dwight Correctional Center. Ms. Brooks has custody of her daughter's six-year-old daughter. At the present time, and at all times, the only way plaintiff and her granddaughter have been able to communicate with their daughter/mother has been to accept collect calls placed by her incarcerated daughter and billed to plaintiff by the defendant telephone company which is a party to an exclusive dealing contract governing telephone service by inmates at the correctional institution in which her daughter is incarcerated. Plaintiff has been billed by defendants CONSOLIDATED PUBLIC SERVICES, INC. (hereafter, Consolidated), and Ameritech.

10. Plaintiff, JEANNE GAMMON, is a Chicago resident who has had custody of the daughter of Raquel Loving, who was incarcerated at Dwight, Dixon and Logan. In order for Ms. Loving to communicate with her daughter, plaintiff had to accept collect calls from the prison which had an exclusive contract with one of the defendant phone companies. Plaintiff was billed by defendant Consolidated.

11. Plaintiff, GUADALUPE GIRON, is a resident of Chicago, Illinois. Her son is presently incarcerated at the correctional institution at Joliet, operated by the State. At other times, plaintiff's son was incarcerated at Pontiac and Pickneyville, operated by the State and at Cook County Jail, operated by the defendant, COUNTY OF COOK (hereafter, the County). At the present time, and at all times, the only way plaintiff has been able to communicate by telephone with her son has been to

accept collect calls which are placed by him and billed to plaintiff by the telephone company which is a party to an exclusive dealing contract governing telephone service by inmates made at the correctional institution in which her son is incarcerated. Plaintiff has been billed by defendants, Consolidated, MCI TELECOMMUNICATIONS CORPORATION (hereafter, MCI), and AT&T for such calls.

12. Plaintiff, WILLIE MAE HAGGARD, is a resident of Chicago, Illinois. Her daughter is presently incarcerated at the Dwight correctional institution, operated by the State and has been also incarcerated at other Illinois correctional institutions and Cook County Jail. At the present time, and at all times, the only way plaintiff has been able to communicate by telephone with her daughter has been to accept collect calls which are placed by her daughter and billed to plaintiff by the telephone company which is a party to an exclusive dealing contract governing telephone service by inmates made at the correctional institution in which her daughter is incarcerated. Plaintiff has been billed by defendants, Consolidated, Ameritech and AT&T for such calls.

13. Plaintiff, LINDA GOODMAN, is a resident of Round Lake Park, Illinois. Her husband is presently incarcerated at Stateville, and at other times has been incarcerated at Menard and Pontiac correctional facilities, also operated by the State. At the present time, and at all times, the only way plaintiff has been able to communicate by telephone with her husband has been to accept collect calls which are placed by him and billed to plaintiff by the telephone company which is a party to an exclusive dealing contract governing telephone service by inmates made at the correctional institution in which he is incarcerated. Plaintiff has been billed by defendants, Consolidated, Ameritech and AT&T, for such calls.

14. Plaintiff, CAROLYN HAWTHORNE, is a resident of Chicago; Illinois. Her two sons are presently incarcerated at Galesberg and Danville, also operated by the State. At other times, plaintiff's sons were incarcerated at the State correctional facilities at Big Muddy River and Danville. At the present time, and at all times, the only way plaintiff has been able to communicate by telephone with her sons has been to accept collect calls which are placed by them and billed to plaintiff by the telephone company which is a party to an exclusive dealing contract governing telephone service by inmates made at the correctional institution in which her sons are incarcerated. Plaintiff has been billed by defendants, Consolidated and MCI, for such calls.

15. Plaintiff, SUSAN HAZELY, is a resident of Rockford, Illinois. Her husband is presently incarcerated at Dixon, Illinois, a correctional institution operated by the State. At other times, plaintiff's husband was incarcerated at correctional institutions in Big Muddy River and Danville, also operated by the State. At the present time, and at all times, the only way plaintiff has been able to communicate by telephone with her husband has been to accept collect calls which are placed by him and billed to plaintiff by the telephone company which is a party to an exclusive dealing contract governing telephone service by inmates made at the correctional institution in which her husband is incarcerated. Plaintiff has been billed by defendants, Consolidated and MCI, for such calls.

16. Plaintiff, MARY HIGH, is a resident of Rockford, Illinois. Her husband is presently incarcerated at Dixon, Illinois, a correctional institution operated by the State. At other times, plaintiff's husband was incarcerated at the DuPage County Jail, operated by the defendant, COUNTY OF DuPAGE. At the present time, and at all times, the only way plaintiff has been able to communicate by telephone with her husband has been to accept collect calls which are placed by him and billed to plaintiff by the telephone company which is a party to an

exclusive dealing contract governing telephone service by inmates made at the correctional institution in which her husband is incarcerated. Plaintiff has been billed by defendants, Consolidated and Ameritech, for such calls.

17. Plaintiff, AKUA HOPE, is a resident of New York, New York. Her husband is presently incarcerated at Cook County Jail. At other times, plaintiff's husband was incarcerated at the State correctional institution at Menard. At the present time, and at all times, the only way plaintiff has been able to communicate by telephone with her husband has been to accept collect calls which are placed by him and billed to plaintiff by the telephone company which is a party to an exclusive dealing contract governing telephone service by inmates made at the correctional institution in which her husband is incarcerated. Plaintiff has been billed by defendants, Consolidated and AT&T, for such calls.

18. Plaintiff, ARLENE JOHNSON, is a resident of Buffalo Grove, Illinois. Her husband is presently incarcerated at Menard and at other times has been incarcerated at the correctional institutions at Dixon, Stateville and Pontiac. At the present time, and at all times, the only way plaintiff has been able to communicate by telephone with her husband has been to accept collect calls which are placed by him and billed to plaintiff by the telephone company which is a party to an exclusive dealing contract governing telephone service by inmates made at the correctional institution in which her husband is incarcerated. Plaintiff has been billed by defendants, Ameritech, Consolidated and AT&T, for such calls.

19. Plaintiff, ANTHONY MALTESE, is a resident of Cicero, Illinois. His brother is presently incarcerated at Stateville and at other times has been incarcerated at Pontiac and Illinois River, also operated by the State. At the present time, and at all times, the only way plaintiff has been able to communicate by telephone with his brother has been to accept collect calls which

are placed by him and billed to plaintiff by the telephone company which is a party to an exclusive dealing contract governing telephone service by inmates made at the correctional institution in which his brother is incarcerated. Plaintiff has been billed by defendant, AT & T, for such calls.

20. Plaintiff, SANDY MARKIEWICZ, is a resident of South Elgin, Illinois. Her husband is presently incarcerated at Menard and at other times has been incarcerated at Stateville, Pontiac and the Kane County Jail, operated by defendant, COUNTY OF KANE. At the present time, and at all times, the only way plaintiff has been able to communicate by telephone with her husband has been to accept collect calls which are placed by him and billed to plaintiff by the telephone company which is a party to an exclusive dealing contract governing telephone service by inmates made at the correctional institution in which her husband is incarcerated. Plaintiff has been billed by defendants, Consolidated, AT&T and INVISION TELECOM, for such calls.

21. Plaintiff, CATHERINE NYSTROM, is a resident of Rockford, Illinois. Her son is presently incarcerated at the Dixon correctional institution and at other times has been incarcerated at the State correctional facilities at Shawnee and Vienna. At the present time, and at all times, the only way plaintiff has been able to communicate by telephone with her son has been to accept collect calls which are placed by him and billed to plaintiff by the telephone company which is a party to an exclusive dealing contract governing telephone service by inmates made at the correctional institution in which her husband is incarcerated. Plaintiff has been billed by defendant, Consolidated, for such calls.

22. Plaintiff, ANNIE ROSS, is a resident of Harvey, Illinois. Her daughter is presently incarcerated at the Dwight correctional institution operated by the State. At other times, her daughter was incarcerated at Cook County Jail. At the present

time, and at all times, the only way plaintiff has been able to communicate by telephone with her daughter has been to accept collect calls which are placed by her and billed to plaintiff by the telephone company which is a party to an exclusive dealing contract governing telephone service by inmates made at the correctional institution in which her daughter is incarcerated. Plaintiff has been billed by defendants, Ameritech and AT&T, for such calls.

23. Plaintiff, JAMILLAH FIELDS, is a resident of Chicago, illinois. Her husband is presently incarcerated in Cook County Jail and at other times has been incarcerated at the State correctional facilities at Menard and Pontiac. At the present time the only way plaintiff has been able to communicate by telephone with her husband has been to accept collect calls which are placed by him and billed to plaintiff by the telephone company which is a party to an exclusive dealing contract governing telephone service by inmates at Cook County Jail

24. Plaintiff, MIDWEST CENTER FOR JUSTICE, LTD., is a professional corporation located in Chicago providing legal services and counseling to persons sentenced to death and incarcerated in prisons in Illinois and in other states.

PRISONER PLAINTIFFS

25. Plaintiffs, LONNIE ARSBERRY, MAYA HAGGARD, JOHN HIGH, JOHN MARKIEWICZ, RODNEY NYSTROM, NATHSON FIELDS, LARRY MACK and MARY WEEKLY (hereafter referred to as "the prisoner plaintiffs"), are presently, or have been at relevant times, incarcerated in correctional institutions operated by the State or Cook, DuPage or Kane counties. As a result of the exclusive agreements among the defendants as alleged herein, these plaintiffs have been subjected to an unreasonable burden on their fight to communicate with their families, loved ones, lawyers and prisoner assistance organizations.

GOVERNMENTAL DEFENDANTS

26. Defendant, STATE OF ILLINOIS, through the Department of Corrections, operates prisons and other correctional facilities in the State of Illinois and, through the Department of Central Management Services, is and has been a party to various agreements with other private defendants herein pursuant to which inmates make collect calls from the institutions in which they are incarcerated.

27. Defendant, MICHAEL S. SCHWARTZ, is currently Director of Central Management Services for the State of Illinois, and as such is responsible for the contracts entered into by the State of Illinois and the various telephone company defendants for the provision of telephone service at prisons operated by the Illinois Department of Corrections. He is sued in his individual capacity.

28. Defendant, DONALD N. SNYDER, is currently Director of the Illinois Department of Corrections, and as such is responsible for the contracts entered into by the State of Illinois and the various telephone company defendants for the provision of telephone service at prisons operated by the Illinois Department of Corrections. He is sued in his individual capacity.

29. Defendant, COUNTY OF COOK, operates a jail and other correctional facilities in Cook County and is and has been a party to various agreements with AT&T pursuant to which inmates make collect calls from the institutions in which they are incarcerated.

30. Defendant, COUNTY OF DuPAGE, operates a jail and other correctional facilities in DuPage County and is and has been a party to various agreements with Ameritech, pursuant to which inmates make collect calls from the institutions in which they are incarcerated.

31. Defendant, COUNTY OF KANE, operates a jail and other correctional facilities in Kane County and is and has been a party to various agreements with Invision Telecom, pursuant to which inmates make collect calls from the institutions in which they are incarcerated.

TELEPHONE COMPANY DEFENDANTS.

32. Defendant, AMERITECH SERVICES, INC., is a corporation engaged in the business of providing telephone service to persons in the State of Illinois and throughout the United States. At various times, it was and continues to be a part), to certain contracts with the State and DuPage County under which it provides the exclusive service to enable inmates to place telephone calls.

33. Defendant, AT&T, is a corporation engaged in the business of providing telephone service to persons in the State of Illinois and throughout the United States. At various times, it was and continues to be a party to certain contracts with the State and the County under which it provides the exclusive service to enable inmates to place telephone calls.

34. Defendant, MCI TELECOMMUNICATIONS CORPORATION, is a corporation engaged in the business of providing telephone service to persons in the State of Illinois and throughout the United States. At various times, it was and continues to be a party to certain contracts with the State under which it provides the exclusive service to enable inmates to place telephone calls.

35. Defendant, CONSOLIDATED COMMUNICATIONS PUBLIC SERVICES, LNC., is a corporation engaged in the business of providing telephone service to persons in the State of Illinois and throughout the United States. At various times, it was and continues to be a part), to certain contracts with the State under which it provides the exclusive service to enable inmates to place telephone calls.

36. Defendant, INVISION TELECOM, is a corporation engaged in the business of providing telephone service to persons in the State of Illinois and throughout the United States. At various times, it was and continues to be a party to certain contracts with Kane County under which it provides the exclusive service to enable inmates to place telephone calls.

CLASS ACTION ALLEGATIONS

37. Plaintiffs bring this case as a class action under Rule 23(b)(2) and (b)(3) of the Federal Rules of Civil Procedure on behalf of two classes. Class (1): Families, Lawyers and Other Bill Payer Plaintiffs, defined as all persons, corporations and organizations billed for telephone calls initiated by an inmate confined to a jail, prison, detention center or other correctional facility of the State and county defendants; Class (2): Prisoner Plaintiffs, defined as all persons incarcerated in correctional institutions operated by the State and county defendants. The case meets all the requirements of Rule 23: (a) each class is so numerous that joinder is impracticable; (b) the issues of law and fact applicable to the named plaintiffs present questions of law and fact common to the class; (c) the claims of the plaintiffs are typical of the claims of the class; and (d) the plaintiffs will adequately and vigorously represent the interests of each class. Each class also meets the requirements of (b)(2) and (b)(3).

STATEMENT OF FACTS

38. An inmate in a correctional facility operated by the State or counties of Cook, DuPage and Kane is prohibited from having any telephone communication with persons outside the institution other than by placing collect calls. He or she must use the telephone service made available at the institution in which he or she is incarcerated. The only way the inmate may communicate by telephone with family, spouses, children, friends, attorneys and prisoner assistance organizations is through the collect call system established by the defendants.

39. All telephone services used by inmates are governed by exclusive dealing agreements between the State or County defendants on the one hand, and one of the defendant telephone companies, on the other, under which the particular defendant telephone company is given the exclusive right to operate the entire collect call service at a particular institution for a specific term. In return for this exclusive arrangement, the defendant telephone company must pay the State or County a "signing bonus" and commissions up to 50% of the revenues it collects from parties it bills for the collect calls. On information and belief, the commissions paid to the State and counties by these telephone companies for inmate-initiated collect calls have averaged more than $15 million a year. The amounts paid to the State and counties are taken directly out of the revenues generated from persons billed for accepting collect calls from inmates.

40. As a result of these exclusive agreements and the exorbitant commissions paid to the State or County, the rates charged to a person accepting a collect call from an inmate are among the highest, if not the highest, for any type of telephone service available to the public, well in excess of charges available to the public for like services. The families, lawyers and other bill payer plaintiffs herein are also subjected to

excessive surcharges or connection fees which may then run three to four times more than non-prison initiated calls.

41. In addition, neither the inmate nor the person billed may utilize any service other than the exclusive collect-call service and at the rates and terms established by such agreements, even though there are numerous alternative options presently available which would result in substantially lower charges, such as "800" or "888"service, use of debit cards by inmates and other services, such as "1-800-COLLECT."

42. Further, even though the person paying for a collect call from an inmate has an ongoing contract with a telephone company for other service and, under that contract, pays substantially less for equivalent service, such service may not be used. Thus, persons billed for calls from inmates cannot take advantage of the numerous options available to all other consumers using telephone service in the State of Illinois.

43. In addition, persons accepting collect calls are not given the same service or access to service that is provided to persons receiving telephone calls from persons other than inmates. The defendant telephone companies refuse to respond to complaints or inquiries concerning problems raised by persons accepting collect calls from inmates. When plaintiffs have attempted to contact the telephone company concerning a disconnection or other problem, they have been unable to receive any response to their complaints or inquiries and there has been no adjustment to their bills. The customer service departments of the defendant telephone companies have stated on numerous occasions to persons inquiring about problems during inmate telephone calls that all such problems should be referred to the prison or jail.

44. Plaintiff Hazely has been subjected to excessive phone bills for calls by her incarcerated husband by defendants, Consolidated and MCI, and is prohibited from using any substantially less costly alternative options, like an 800 number or special rates from her own long distance phone service. Her phone bills, resulting from calls from her incarcerated husband, have averaged up to $300 a month, roughly 20% of her net income. As a result of these phone charges, despite the fact that she is gainfully employed with the Rockford Housing Authority, she had her phone disconnected for as long as eight months at a time.

45. Plaintiff Hawthorne has been subjected to excessive phone bills for calls by her incarcerated sons by defendants, Consolidated and MCI, and is prohibited from using substantially less costly phone call options like an 800 number or special reduced rates from their own long distance phone service. Her inmate phone bills which result from calls from her two incarcerated sons average a minimum of $125 a month. Despite the fact that she is gainfully employed as a CTA bus driver she has had difficulty paying her phone bills and has had her phone service disconnected.

46. Plaintiff Hope has been subjected to excessive phone bills for the calls from her incarcerated husband by defendants, Consolidated and AT&T, and is prohibited from using substantially less costly phone call options like an 800 number or her own long distance service. Her phone bills, resulting from calls from her incarcerated husband, constitute 25% of her income. At $400 a month, her calls cost more than her rent, and as a result she has been unable to keep her account with the phone company current. She has had to negotiate an installment plan with the phone company under threat of having her phone service disconnected and had to prevail upon her husband to severely curtail his phone calls home.

47. Plaintiff Maltese has been subjected to excessive phone bills for calls from his incarcerated brother by defendant AT&T and is prohibited from using any less costly alternative means of phone service. Plaintiff's inmate phone bills average $150 per month.

48. Plaintiff Giron has been subjected to excessive rates for calls from her incarcerated son by defendants, MCI and Consolidated, and is prohibited from using any less costly alternative means of phone service. Her inmate phone bills average about $100 a month. She has paid over $3,500 in inmate phone calls since 1996, and has had her service wrongfully blocked and terminated.

49. Plaintiff Goodman's inmate phone bills now average nearly $200 a month; she paid a total of $2,000 in 1998 for such telephone calls. She cannot afford these amounts because she is the sole means of support for her household and her child. In addition, plaintiff has spent many hours of her time trying to get the defendant telephone companies to refund connection charges for phone calls that were cut-off as a result of poor equipment and maintenance of the prison phone systems. When her husband was incarcerated at Menard, defendant Consolidated arbitrarily assigned plaintiff a credit limit of $100 a month for calls from her husband. When that credit limit was reached, plaintiff's calls from her husband were automatically blocked for the remainder of the month even though plaintiff was willing and able to pay an amount greater than $100 for such telephone calls. Although plaintiff was later able to have her credit limit raised, her calls frequently were blocked before the end of the month.

50. Plaintiff Arsberry's inmate phone bills average $200 a month. Because she has two small children to care for, she cannot work outside her home. She earns a small income by providing day care in her own home, but it is not nearly enough to cover the cost of the inmate-phone bills. These bills have

been financially crippling for her and at times her phone service has been cut off because she cannot keep up with the bills.

51. Plaintiff Johnson's monthly inmate phone bills average $150 a month. In addition, she estimates that a substantial amount of these bills are for duplicate connection charges caused by spontaneous disconnections. Despite her diligent efforts, she has been unable to get any of her money refunded.

52. Plaintiff Nystrom has monthly inmate phone bills that have run from a low of $130 a month to a high of $400 a month. This has meant that she and her husband, whose work as an iron worker is occasionally seasonal, have had to resort to juggling their finances to keep their phone service from being disconnected, and have as a result incurred steep late fees on credit cards balances or personal loans, compounding their financial concerns. Keeping her phone connected is of especially great importance to plaintiff Nystrom as all of both her and her husband's family are located out of state, and it is their only means of staying touch with them.

53. Plaintiff Ross' inmate phone bills averaged $600 a month until she eventually fell behind on her payments, and her service was cut off. Ms. Ross and her husband live on $520 a month he receives from Social Security. Her phone remains disconnected because she cannot pay off the remaining balance.

54. Plaintiff Brooks has been subjected to excessive phone bills for the calls from her incarcerated daughter by defendants Consolidated and Ameritech and is prohibited from using any less costly alternative means of phone service. As a result of the excessive phone costs, plaintiff Brooks had to instruct her daughter to make far less calls, thus severely limiting plaintiff and her granddaughter from communicating with their incarcerated daughter/mother.

55. Plaintiff Gammon was subjected to excessive phone charges by defendant Consolidated in order to enable the daughter of a prisoner to have communication with her mother. Plaintiff was forced to pay these excessive rates even though during part of the period she accepted such calls she was in a management position at Ameritech and was entitled to substantially reduced phone services. She was unable to take advantage of the "Call-Me" card given to her by her employer and was also unable to obtain an 800 number to pay for these calls.

56. Plaintiff Haggard, disabled and receiving Social Security Disability, is caring for the four children of her incarcerated daughter on a total of under $900 a month. She has been unable to communicate with any frequency with her daughter, nor have her grandchildren spoken frequently with their mother. On many occasions, plaintiff's telephone connection with her daughter has been cut off, and she has been unable to obtain service to correct this problem or a lowering of her telephone bill.

57. Plaintiff High has had to pay excessive phone rates and surcharges in order to communicate with her husband by telephone. When her husband was incarcerated in the DuPage County Jail, plaintiff lived just ten minutes from the jail and yet received bills from defendant Ameritech averaging in excess of 50 cents a minute. Similarly, when her husband was transferred to Dixon, she received exorbitant bills, including a connection charge in excess of $2.50. Frequently, her telephone calls have been cut off without explanation, requiring her husband to place another call and for plaintiff thus to incur another connection charge.

58. Plaintiff Markewicz has had to pay excessive telephone bills and has frequently been disconnected in the middle of telephone calls with her husband, who must then place another call to her, requiring her to incur another expensive connection charge. In addition, on some occasions when another party is

trying to call plaintiff through her "call waiting" service during a telephone call with her husband, she is automatically disconnected. If plaintiff were to respond to the "call waiting" signal, she would be automatically disconnected from the call with her husband. Frequently, in the middle of calls, recordings interrupt a telephone call she is having with her husband.

59. Plaintiff Jamillah Fields has had to pay excessive phone rates and surcharges in order to communicate with her husband by telephone and has been prohibited from using other less costly alternative means of phone service.

60. Plaintiff, Midwest Center for Justice, Ltd., has been substantially impeded in its ability to adequately represent and counsel its clients on death row because it is unable to utilize any service other than the one imposed by the State. When the plaintiff accepts calls from clients, it cannot allow those clients to talk at any length on the telephone because of the high rates. Approximately one year ago, the Center installed an "888" number which would allow callers to make toll-free calls. A representative of the plaintiff approached the Department of Corrections to allow use of this "888" line for its clients and although it was technically feasible, the Department refused.

61. Because of the exorbitant rates charged for telephone calls from prisoners and lack of other options, prisoner assistance organizations, lawyers and other persons and/or institutions in the business of providing aid and service to prisoners have had to incur a substantial expense in order to adequately provide aid and service to prisoners and have been impeded in their work and mission.

62. Since many of the incarcerated family members and loved ones of the plaintiff class have limited writing skills, and since they are imprisoned hundreds of miles from their families, requiring substantial time and resources for visits, telephone communication is the most viable way for communication

between families and their lived ones.

63. Communication with family members is a well-recognized and accepted principle of rehabilitation for prisoners.

COUNT I

EQUAL PROTECTION CLAIMS AGAINST THE STATE, SNYDER, SCHWARTZ, AMERITECH, AT&T, MCI AND CONSOLIDATED BY FAMILIES, LAWYERS AND BILL PAYER PLAINTIFFS

64. Plaintiffs reallege and incorporate herein paragraphs 1 through 63 of this complaint.

65. Defendant State, and its designated officials including defendants Schwartz and Snyder, acting in concert and/or conspiracy with the telephone company defendants, has established discriminatory and excessive sur-charges and rates for inmate phone calls, prohibited any alternative less costly inmate calling options, and denied plaintiffs the same service afforded other consumers of phone services in Illinois.

66. Such policies and practices operate as a special discriminatory tax or fee and an undue burden placed on persons who receive phone calls from prisoners, thus constituting an invidious and unreasonable classification in violation of the equal protection clause of the Fifth and Fourteenth Amendments of the United States Constitution.

COUNT II

EQUAL PROTECTION CLAIMS AGAINST COOK, DuPAGE AND KANE COUNTIES AND AT&T, AMERITECH AND INVISION TELECOM BY FAMILIES, LAWYERS AND BILL PAYER PLAINTIFFS

67. Plaintiffs reallege and incorporate herein paragraphs 1 through 63 of this complaint.

68. Defendant Cook County acting in concert and/or conspiracy with defendant AT&T, defendant DuPage County acting in concert and/or conspiracy with defendant Ameritech, and defendant Kane County acting in concert and/or conspiracy with defendant Invision Telecom, have established discriminatory and excessive surcharges and rates for inmate phone calls, prohibited any alternative less costly inmate calling options, and denied plaintiffs the same service afforded other consumers of phone service in Illinois.

69. Such policies and practices operate as a special discriminatory tax or fee and an undue burden on persons who receive phone calls from prisoners not placed on other consumers, thus constituting an invidious and unreasonable classification in violation of the equal protection clause of the Fifth and Fourteenth Amendments of the United States Constitution.

COUNT III

EQUAL PROTECTION CLAIMS AGAINST THE STATE, SNYDER, SCHWARTZ, AMERITECH, AT&T, MCI AND CONSOLIDATED BY PRISONER PLAINTIFFS

70. Plaintiffs reallege and incorporate herein paragraphs 1 through 63 of this complaint.

71. Defendant State, and its designated officials including defendants Schwartz and Snyder, acting in concert and/or conspiracy with the telephone company defendants, has established discriminatory and excessive sur-charges and rates for inmate phone calls, prohibited any alternative less costly inmate calling options, and denied plaintiffs the same service afforded other consumers of phone services in Illinois.

72. Such policies and practices place an undue burden on the prisoner plaintiffs in communicating with the outside world, thus constituting an invidious and unreasonable classification in violation of their rights under the equal protection clause of the Fifth and Fourteenth Amendments of the United States Constitution.

COUNT IV

EQUAL PROTECTION CLAIMS AGAINST COOK, DuPAGE AND KANE COUNTIES AND AT&T, AMERITECH AND INVISION TELECOM BY PRISONER PLAINTIFFS

73. Plaintiffs reallege and incorporate herein paragraphs 1 through 63 of this complaint.

74. Defendant Cook County acting in concert and/or conspiracy with defendant AT&T, defendant DuPage County acting in concert and/or conspiracy with defendant Ameritech, and defendant Kane County acting in concert and/or conspiracy with defendant Invision Telecom, have established discriminatory and excessive surcharges and rates for inmate phone calls, prohibited any alternative less costly inmate calling options, and denied plaintiffs the same service afforded other consumers of phone service in Illinois.

75. Such policies and practices place an undue burden on the prisoner plaintiffs in communicating with the outside world, thus constituting an invidious and unreasonable classification in violation of their rights under the equal protection clause of the Fifth and Fourteenth Amendments of the United States Constitution.

COUNT V

FIRST AMENDMENT CLAIMS AGAINST THE STATE, SNYDER, SCHWARTZ, AMERITECH, AT&T, MCI AND CONSOLIDATED BY FAMILIES, LAWYERS AND OTHER BILL PAYER PLAINTIFFS

76. Plaintiffs reallege and incorporate herein paragraphs 1 through 63 of this complaint.

77. Plaintiffs, as the wives, mothers, siblings and loved ones of prisoners, and lawyers and prisoner-assistance organizations, have a right under the First and Fourteenth Amendments to the United States Constitution to communicate with persons incarcerated by the State of Illinois. By virtue of the exclusive agreements between the State and the defendant telephone companies, plaintiffs must pay exorbitant rates to the defendants to speak to a prisoner, are prohibited from using less expensive alternative means of communicating, and are denied adequate service by the defendants. The defendants, acting in concert or in conspiracy, have placed undue and unreasonable burdens on the plaintiffs' rights of association and freedom of speech, in violation of the First and Fourteenth Amendments of the United States Constitution.

COUNT VI

FIRST AMENDMENT CLAIMS AGAINST COOK, DuPAGE AND KANE COUNTIES AND AT&T, AMERITECH AND INVISION TELECOM BY FAMILIES, LAWYERS AND BILL PAYER PLAINTIFFS

78. Plaintiffs reallege and incorporate herein paragraphs 1 through 63 of this complaint.

79. Plaintiffs, as the wives, mothers, siblings and loved ones of prisoners, and lawyers and prisoner-assistance organizations, have a right under the First and Fourteenth Amendments to the United States Constitution to communicate with persons incarcerated by Cook, DuPage and Kane Counties. By virtue of the exclusive agreements between these counties and defendants AT&T, Ameritech, and Invision Telecom, plaintiffs must pay exorbitant rates to the defendants to speak to a prisoner, are prohibited from using less expensive alternative means of communicating, and are denied adequate service by the defendants. The defendants, acting in concert or in conspiracy, have placed undue and unreasonable burdens on the plaintiffs' rights of association and freedom of speech, in violation of the First and Fourteenth Amendments of the United States Constitution.

COUNT VII

FIRST AMENDMENT CLAIMS AGAINST THE STATE, SNYDER, SCHWARTZ, AMERITECH, AT&T, MCI AND CONSOLIDATED BY PRISONER PLAINTIFFS

80. Plaintiffs reallege and incorporate herein paragraphs ! through 63 of this complaint.

81. Prisoner plaintiffs have a fight under the First and Fourteenth Amendments to the United States Constitution to communicate with family, loved ones, lawyers and prisoner organizations. By virtue of the exclusive agreements between the State and the defendant telephone companies, prisoner plaintiffs are severely restricted in their ability to so communicate. The defendants, acting in concert or in conspiracy, have placed undue and unreasonable burdens on these plaintiffs' rights of association and freedom of speech, in violation of the First and Fourteenth Amendments of the United States Constitution.

COUNT VIII

FIRST AMENDMENT CLAIMS AGAINST COOK, DuPAGE AND KANE COUNTIES AND AT&T, AMERITECH AND INVISION TELECOM BY PRISONER PLAINTIFFS

82. Plaintiffs reallege and incorporate herein paragraphs 1 through 63 of this complaint.

83. Prisoner plaintiffs have a right under the First and Fourteenth Amendments to the United States Constitution to communicate with family, loved ones, lawyers and prisoner organizations. By virtue of the exclusive agreements between the defendant counties and defendant telephone companies, prisoner plaintiffs are severely restricted in their ability to so communicate. The defendants, acting in concert or in conspiracy, have placed undue and unreasonable burdens on these plaintiffs' rights of association and freedom of speech, in violation of the First and Fourteenth Amendments of the United States Constitution.

COUNT IX

DUE PROCESS CLAIMS AGAINST THE STATE, SNYDER, SCHWARTZ, AT&T, MCI, AMERITECH, AND CONSOLIDATED BY FAMILIES, LAWYERS AND BILL PAYER PLAINTIFFS

84. Plaintiffs reallege and incorporate herein paragraphs 1 through 63 of this complaint.

85. Defendant State, through its designated officials, acting in concert and/or conspiracy with the defendant telephone companies, have created exclusive agreements which impose on plaintiffs exorbitant rates and prohibit less costly calling alternatives for calls by prisoners from penal institutions.

86. Such agreements, and their effects, constitute a confiscation of plaintiffs' property and an unreasonable deprivation of their rights of free speech and association, in violation of procedural and substantive due process protections under the Fifth and Fourteenth Amendments of the United States Constitution.

COUNT X

DUE PROCESS CLAIMS AGAINST COOK, DuPAGE AND KANE COUNTIES AND AT&T, AMERITECH AND INVISION TELECOM BY FAMILIES, LAWYERS AND BILL PAYER PLAINTIFFS

87. Plaintiff reallege and incorporate herein paragraphs 1 through 63 of this complaint.

88. Defendant Cook, DuPage and Kane counties, through its designated officials, acting in concert and/or conspiracy with the defendant AT&T, Ameritech and Invision Telecom, respectively, have created exclusive agreements which impose on plaintiffs exorbitant rates and prohibit less costly calling alternatives for calls by prisoners from penal institutions.

89. Such agreements, and their effects, constitute a confiscation of plaintiffs' property and an unreasonable deprivation of their rights of free speech and association, in violation of procedural and substantive due process protections under the Fifth and Fourteenth Amendments of the United States Constitution.

COUNT XI

DUE PROCESS CLAIMS AGAINST THE STATE, SNYDER, SCHWARTZ AND AT&T, AMERITECH, MCI AND CONSOLIDATED BY PRISONER PLAINTIFFS

90. Plaintiff reallege and incorporate herein paragraphs 1 through 63 of this complaint.

91. Defendant State, and its designated officials including defendants Schwartz and Snyder, acting in concert and/or conspiracy with the defendant telephone companies, have created exclusive agreements which impose on plaintiffs exorbitant rates and prohibit less costly calling alternatives for calls by prisoners from penal institutions.

92. Regulations of the Illinois Department of Corrections allowing for prisoner telephone calls creates a liberty interest which the prisoner plaintiffs are being denied, in violation of their rights to procedural and substantive due process under the Fifth and Fourteenth Amendments to the United States Constitution.

COUNT XII

DUE PROCESS CLAIMS AGAINST COOK, DuPAGE AND KANE COUNTIES AND AT&T, AMERITECH AND INVISION TELECOM BY PRISONER PLAINTIFFS

93. Plaintiff reallege and incorporate herein paragraphs 1 through 63 of this complaint.

94. Defendant Cook, DuPage and Kane counties, through its designated officials, acting in concert and/or conspiracy with the defendant AT&T, Ameritech and Invision Telecom, respectively, have created exclusive agreements which impose on plaintiffs exorbitant rates and prohibit less costly calling alternatives for calls by prisoners from penal institutions.

95. Regulations of the defendant counties allowing for prisoner telephone calls creates a liberty interest which the prisoner plaintiffs are being denied, in violation of their rights to procedural and substantive due process under the Fifth and Fourteenth Amendments to the United States Constitution.

COUNT XIII

CLAIM OF UNCONSTITUTIONAL IMPAIRMENT OF CONTRACT AGAINST THE STATE, SNYDER, SCHWARTZ, AT&T, MCI, AMERITECH AND CONSOLIDATED BY FAMILIES, LAWYERS AND BILL PAYER PLAINTIFFS

96. Plaintiffs reallege and incorporate herein Paragraphs 1 through 63 of this complaint.

97. The plaintiffs, at all relevant times, have had and continue to have ongoing monthly contracts with telephone companies which govern the general telephone service provided them,

other than calls with inmates. These contracts provide for substantially lower rates for collect calls than are imposed on them by the defendants by virtue of their exclusive agreements and also offer other services, options and means of using the telephone which would result in substantially lower charges and substantially improved service, if used for calls from inmates.

98. Defendant State, and its designated officials including defendants Schwartz and Snyder, acting in concert and/or conspiracy with the defendant telephone companies, has created exclusive agreements which impose on plaintiffs exorbitant rates and prohibit less costly alternatives for calls by prisoners from penal institutions. The imposition of these restrictions and requirements on the plaintiffs as a result of the illegal agreements between the State and defendant telephone companies prevents and prohibits plaintiffs from exercising their rights under existing contracts they have for telephone service. By virtue of these exclusive agreements, plaintiffs are made forced customers of defendant telephone companies. These restrictions and requirements constitute a substantial impairment of plaintiffs' contractual relationships with others, in violation of Article I, § 10 of the United States Constitution.

COUNT XIV

CLAIM OF UNCONSTITUTIONAL IMPAIRMENT OF CONTRACT AGAINST COOK, DuPAGE AND KANE COUNTIES, AT&T, AMERITECH AND INVISION TELECOM BY FAMILIES, LAWYERS AND BILL PAYER PLAINTIFFS

99. Plaintiffs reallege and incorporate herein paragraphs 1 through 63 of this complaint.

100. The plaintiffs, at all relevant times, have had and continue to have ongoing monthly contracts with telephone companies which govern the general telephone service provided them,

other than calls with inmates. These contracts provide for substantially lower rates for collect calls than are imposed on them by the defendants by virtue of their exclusive agreements and also offer other services, options and means of using the telephone which would result in substantially lower charges and substantially improved service, if used for calls from inmates.

101. Defendant County, through its designated officials, acting in concert and/or conspiracy with the defendant AT&T, has created exclusive agreements which impose on plaintiffs exorbitant rates and prohibit less costly alternatives for calls by prisoners from penal institutions. The imposition of these restrictions and requirements on the plaintiffs as a result of the illegal agreements between the County and defendant AT&T prevents and prohibits plaintiffs from exercising their rights under existing contracts they have for telephone service. By virtue of these exclusive agreements, plaintiffs are made forced customers of defendant telephone company. These restrictions and requirements constitute a substantial impairment of plaintiffs' contractual relationships with others, in violation of Article I, § 10 of the United States Constitution,

COUNT XV

SHERMAN ACT CLAIMS AGAINST ALL DEFENDANTS - BY FAMILIES, LAWYERS AND BILL PAYER PLAINTIFFS

102. Plaintiffs reallege and incorporatc herein by reference paragraphs 1 through 63 of this complaint.

103. Defendants, State, and its designated officials including defendants Schwartz and Snyder, Cook, DuPage and Kane counties and telephone companies, acting jointly and in concert, contracted, combined and/or conspired to enter into the agreements regarding inmate telephone service.

104. The foregoing conduct of these defendants has produced adverse anticompetitive effects within the market for inmate-initiated telephone calls in the State of Illinois and has unreasonably restrained trade in interstate commerce.

105. By virtue of the forgoing conduct, defendants have violated § 1 of the Sherman Act, 15 U.S.C. § 1.

106. By virtue of the foregoing unlawful conduct, the plaintiffs and class have suffered proximate injury, having paid unjustified, exorbitant and unreasonable charges for telephone calls received from inmates and have been prevented from choosing other options of telephone service for use in receiving telephone calls from inmates incarcerated in the State of Illinois.

COUNT XVI

CLAIMS UNDER THE TELECOMMUNICATIONS ACT OF 1996 AGAINST TELEPHONE COMPANY DEFENDANTS BY FAMILIES, LAWYERS AND BILL PAYER PLAINTIFFS

107. Plaintiffs reallege and incorporate herein paragraphs 1 through 63 of this complaint.

108. Defendants, Ameritech, AT&T, MCI, Consolidated, and Invision Telecom, are common carriers subject to the terms of the Telecommunications Act.

109. Section 201(a) provides that "[i]t shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor .... "Section 201(b) requires that all "charges, practices, classifications and regulations for and in connection with such communication service shall be just and reasonable, and any such charge,

practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful...."

110. The charges, practices, classifications and regulations which are imposed on plaintiffs as authorized by the illegal agreements among the defendants herein are "unjust" and "unreasonable," in violation of § 201(b) of the Act.

111. Section 202(a) makes it unlawful for any of the defendants herein "to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class or persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage." The charges, practices, classifications, regulations, facilities, or services which are imposed on plaintiffs as authorized by the illegal agreements among the defendants herein violate of § 202(a)of the Act.

COUNT XVII

CLAIMS UNDER ILLINOIS CONSTITUTION AGAINST THE STATEBY FAMILIES, LAWYERS AND BILL PAYER PLAINTIFFS

112. Plaintiffs reallege and incorporate herein paragraphs 1 through 63 of this complaint.

113. Plaintiffs allege four violations of the Illinois Constitution against the State:

A. The exorbitant charges imposed on the plaintiffs and the plaintiff class are violations of plaintiffs' rights to due process and equal protection under Article I, § 2 of the Illinois Constitution in that the persons selected by the State to pay such

charges, i.e., plaintiffs and the plaintiff class, constitute an unreasonable and arbitrary classification by the State, with respect to the imposition of a tax, which places on the plaintiffs burdens not shared by others.

B. Article IX, § 2 provides that in any law classifying the subjects or objects of non-property taxes or fees, the classes shall be reasonable and the subjects and objects within each class shall be taxed uniformly. The excessive and exorbitant charges to the plaintiffs and plaintiff class constitute a tax or fee on this class of users of telephones, in violation of Article IX, § 2.

C. The requirements placed on plaintiffs to deal with the State constitutes a substantial impairment of plaintiffs' contractual relationships with telephone companies of their choice and grants to the defendant telephone companies special privileges and immunities, in violation of Article I, § 16 of the Illinois Constitution.

D. The use of funds from the exorbitant fees charged for collect calls by the governmental defendants for purposes unrelated to telephone service for inmates constitutes an unlawful tax and is an unlawful usurpation of power resting with the legislative branch of government, in violation of separation of powers clause, in the State of Illinois, in Article II § 1.

COUNT XVIII

CLAIMS UNDER ILLINOIS CONSTITUTION AGAINST COOK, DuPAGE AND KANE COUNTIES BY FAMILIES, LAWYERS AND BILL PAYER PLAINTIFFS

114. Plaintiffs reallege and incorporate herein paragraphs 1 through 63 of this complaint.

115. Plaintiffs allege four violations of the Illinois Constitution against Cook, DuPage and Kane counties:

A. The exorbitant charges imposed on the plaintiffs and the plaintiff class are violations of plaintiffs' rights to due process and equal protection under Article I, § 2 of the Illinois Constitution in that the persons selected by the County to pay such charges, i.e., plaintiffs and the plaintiff class, constitute an unreasonable and arbitrary classification by the County, with respect to the imposition of a tax, which places on the plaintiffs burdens not shared by others.

B. Article IX, §, 2 provides that in any law classifying the subjects or objects of non-property taxes or fees, the classes shall be reasonable and the subjects and objects within each class shall be taxed uniformly. The excessive and exorbitant charges to the plaintiffs and plaintiff class constitute a tax or fee on this class of users of telephones, in violation of Article IX, § 2.

C. The requirements placed on plaintiffs to deal with the County constitutes a substantial impairment of plaintiffs' contractual relationships with telephone companies of their choice and grants to the defendant AT&T and Invision Telecom special privileges and immunities, in violation of Article I, § 16 of the Illinois Constitution.

D. The use of funds from the exorbitant fees charged for collect calls by the governmental defendants for purposes unrelated to telephone service for inmates constitutes an unlawful tax and is an unlawful usurpation of power resting with the legislative branch of government, in violation of separation of powers clause, in the State of Illinois, in Article 1, § 1.

COUNT XIX

CLAIMS UNDER ILLINOIS CONSTITUTION AGAINST THE STATE, SNYDER, SCHWARTZ BY PRISONER PLAINTIFFS

116. Plaintiffs reallege and incorporate herein paragraphs 1 through 63 of this complaint.

117. The policies and practices alleged herein place an undue burden on the prisoner plaintiffs in communicating with the outside world, thus constituting an invidious and unreasonable classification in violation of their rights to equal protection. In addition, regulations of the Illinois Department of Corrections allowing for prisoner telephone calls creates a liberty interest which the prisoner plaintiffs are being denied, in violation of their fights to procedural and substantive due process.

118. The above constitutes violations of plaintiffs' rights to due process and equal protection of the laws under Article I, § 2 of the Illinois Constitution.

COUNT XX

CLAIMS UNDER ILLINOIS CONSTITUTION AGAINST COOK, DuPAGE AND KANE COUNTIES BY PRISONER PLAINTIFFS

119. Plaintiffs reallege and incorporate herein paragraphs 1 through 63 of this complaint.

120. The policies and practices alleged herein place an undue burden on the prisoner plaintiffs in communicating with the outside world, thus constituting an invidious and unreasonable classification in violation of their rights to equal protection. In

addition, regulations of the defendant counties allowing for prisoner telephone calls creates a liberty interest which the prisoner plaintiffs are being denied, in violation of their rights to procedural and substantive due process.

121. The above constitutes violations of plaintiffs' rights to due process and equal protection of the laws under Article I, § 2 of the Illinois Constitution.

COUNT XXI

CLAIMS UNDER ILLINOIS ANTITRUST ACT AGAINST ALL DEFENDANTS BY FAMILIES, LAWYERS AND OTItER BILL PAYER PLAINTIFFS

122. This count is brought pursuant to § 7 of the Illinois Antitrust Act, which authorizes persons injured by any violation of the Illinois Antitrust Act to bring suit for an injunction and damages.

123. Plaintiffs reallege and incorporate herein paragraphs 1 through 63 of this complaint.

124. The State, Snyder, Schwartz, Cook, DuPage and Kane counties and telephone company defendants, acting jointly and in concert, contracted, combined and/or conspired to enter into the agreements regarding inmate telephone service.

125. The foregoing conduct of the governmental and telephone company defendants has produced adverse anticompetitive effects within the market for inmate-initiated telephone calls in the State of Illinois and has unreasonably restrained trade in this State.

126. By virtue of the forgoing conduct, the governmental and telephone company defendants have violated § 3 of the Illinois Antitrust Act, 740 ILCS 10/3.

127. By virtue of the foregoing unlawful conduct, the plaintiffs and class have suffered. proximate injury, having paid unjustified, exorbitant and unreasonable charges for telephone calls received from inmates and have been prevented from choosing other options of telephone service for use in receiving telephone calls from inmates incarcerated in the State of Illinois. WHEREFORE, plaintiffs respectfully request that the Court:

A. Certify this case as a class action.

B. Issue a declaratory judgment that the agreements, acts and practices alleged herein are illegal, as alleged in each count.

C. Enjoin the agreements, acts and practices found to be illegal herein and order the defendants to provide to the plaintiffs and members of the plaintiff class telephone service which is legal and proper; and issue such other injunctive relief that will remedy the violations of plaintiffs' rights herein and assure that telephone service provided to inmates hereafter is just, lawful and non-discriminatory.

D. Order the defendants to provide restitution to the plaintiffs and members of the plaintiff class for all losses they have incurred herein.

E. Award compensatory and punitive damages, and treble damages under the Sherman Act to plaintiffs and members of the plaintiff class.

F. Award plaintiffs and the plaintiff class their attorneys' fees, costs and expenses.

7. Provide for such other relief as is just and proper.

Date: June 29, 1999

APPENDIX B

In the United States District Court,
N.D. Illinois, Eastern Division

99 C 2457

Katie Arsberry, et al.,

Plaintiffs-Appellants,

v.

State of Illinois, et al.,

Defendants-Appellees.

United States District Court,
N.D. Illinois,
Eastern Division.

Prisoners and those wishing to have telephone contact with them sued state and telephone companies, challenging fairness of collect call rates. On defendants' motions to dismiss, the District Court, Hibbler, J., held that issue was non- justiciable under the "filed rate" and "primary jurisdiction" doctrines.

Motions granted.

ORDER

HIBBLER, District Judge.

Pending before the Court is defendants' motion to dismiss the action brought against them by Katie Arsberry and others. The plaintiffs may be divided into two groups: (1) prisoners wishing to contact people on the outside and (2) people on the outside wishing to have telephone contact with prisoners. The defendants may also be divided into two groups: (1) governmental entities who are engaged in exclusive dealing agreements with telephone companies and (2) the telephone companies which provide long distance services for the government entities' prisons.

The causes of action arise under the First, Fifth and Fourteenth Amendments of the Constitution; the Sherman Antitrust Act; the Telecommunications Act of 1996; and various state causes of action. The one issue that all of these causes of action have in common is that they challenge the fairness, at some level, of the telephone rates charged by the telephone companies to the recipients of prison inmate-initiated collect telephone calls. However, this is an issue which the Court finds to be non-justiciable under the "filed rate" and "primary jurisdiction" doctrines.

Pursuant to both the federal Telecommunications Act and the Universal Telephone Service Protection Law of 1985, the telephone company defendants file schedules or tariffs governing the telecom services they offer. 47 U.S.C. § 203(a); 220 ILCS § 5/13-501. These schedules contain the rates, terms and conditions of service, and cannot be varied by any other contract, agreement or unilateral action of the parties. American Telephone and Telegraph Co. v. Central Office Telephone, Inc., 524 U.S. 214, 118 S.Ct. 1956, 141 L.Ed.2d 222 (1998). The purpose of the tariff is to preserve to the FCC and ICC the

authority to determine the reasonableness of rates and to ensure that the telephone companies charge only the rates filed with those agencies. Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 577-78, 101 S.Ct. 2925, 69 L.Ed.2d 856 (1981); North River Ins. Co. v. Jones, 275 Ill.App.3d 175, 211 Ill.Dec. 604, 655 N.E.2d 987 (1995), appeal denied 164 Ill.2d 567, 214 Ill.Dec. 323, 660 N.E.2d 1272.

The fact that Congress and the Illinois Legislature have vested these responsibilities in the FCC and ICC, respectively, is highly significant. First, the statutes clearly assign to the FCC and ICC the authority to determine the reasonableness of telecom rates. This is an area in which these dedicated agencies are experts in important ways that the Court is not. Congress' delegation of responsibility to the FCC is something that it was entitled to do under the broad sweep of the Commerce Clause. The Illinois Legislature was similarly authorized to enact the Universal Telephone Service Protection Law. Since they have done so, this Court is in no position to undermine their authority by seizing the fact-finding role for itself.

The "filed rate" doctrine is not merely a random government regulation; it is motivated by two "companion principles"--(1) the need to prevent carriers from engaging in price discrimination as between ratepayers (the "nondiscrimination strand") and (2) the preservation of the exclusive role of federal agencies in approving rates for telecommunications services that are "reasonable" by keeping courts out of the rate-making process (the "nonjusticiability strand"), a function that the federal regulatory agencies are more competent than the Court to perform. Wegoland v. NYNEX Corp., 27 F.3d 17, 19 (2nd Cir.1994); see also H.J. Inc. v. Northwestern Bell Tel. Co., 954 F.2d 485, 488 (8th Cir.1992). Other jurists have waxed eloquent on the pros and cons of this doctrine, but the bottom line is that the fairness of the rate as filed is up to the FCC and ICC. In that determination, this Court has no role at all. There are several compelling reasons which require the Court to defer

to the FCC and ICC in this dispute. First, the Court does not possess any experience in determining the fairness of telephone rates. Second, Congress has laid down no guidelines for judicial determination of these matters. Third, if the Court did interfere, it would violate the separation of powers doctrine and encroach upon the sovereignty of the Illinois state government. Fourth, the Court would run the risk of making a pronouncement on an issue another government body has seized primary jurisdiction over, a situation which could potentially end up in two government bodies rendering inconsistent opinions on the same issue. Given the pervasive interstate commerce issues connected with the process for the establishment of telephone rates, such a situation could be disastrous.

To illustrate how any action taken by this Court could result in a conflict one only need consider the possible remedies available to the Court if it found an equal protection cause of action. If the Court enjoined telephone companies from providing service at the filed rate it would then, in effect, be forcing them to break their "contract" with the FCC and sua sponte usurp the authority of the ICC. If, alternatively, the Court decided to give the plaintiffs monetary compensation, the Court would then be economically punishing the telephone companies for obeying the FCC and ICC, which they are by law required to do. Additionally, in order to set compensation, the Court would be required to make its own determination of "reasonable" as opposed to "excessive" telephone rates. This is the function of the FCC and ICC in this very specialized, regulated industry. Either remedy would interfere with both bodies' delegated powers and authorities. Although there are some significant public policy issues which may dictate a need for review of these rates, it is not the role or function of this Court to effectuate public policy.

The foregoing is true for each and every cause of action asserted. Therefore, the Court must GRANT the Motion to Dismiss because this is a non-justiciable controversy and the FCC and ICC have primary jurisdiction over the issue. It is appropriate that this matter be referred to the FCC and ICC for examination. All motions in the present case are terminated as moot.

APPENDIX C

In the United States Court of Appeals
For the Seventh Circuit

No. 00-1777

Katie Arsberry, et al.,

Plaintiffs-Appellants,

v.

State of Illinois, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 99 C 2457--
William J. Hibbler, Judge.

Argued December 5, 2000--Decided March 19, 2001

Before Posner, Easterbrook, and Evans,
Circuit Judges.

Posner, *Circuit Judge.* This is a suit by Illinois prison and jail inmates, inmates' family members (and other intimates of the inmates), and a public-interest law firm that specializes in the defense of inmates on death row in Illinois. Grounded in 42 U.S.C. sec. 1983, the Sherman Act, and Illinois state law, the suit attacks the practice by which each prison and jail grant one phone company the exclusive right to provide telephone service to the inmates in return for 50 percent of the revenues generated by the service. The suit claims that the rates for the service, which are collect only and are contained in tariffs filed by the phone companies with the Federal Communications Commission and the Illinois Commerce Commission, are exorbitant, being far higher than required to cover the costs involved in providing phone service to inmates. The plaintiffs seek damages and injunctive relief against the phone companies and the state agencies and officials responsible for the arrangements with the companies. The district court dismissed the suit as beyond its jurisdiction by reason of the filed-rate and primary-jurisdiction doctrines.

There are a number of jurisdictional bars or quasi-jurisdictional bars (by the latter term we mean defenses that a court can invoke even if the defendant has not done so, see, e.g., Higgins v. Mississippi, 217 F.3d 951 (7th Cir. 2000)) to various pieces of this suit, quite apart from the ones identified by the district court. The State of Illinois is not a person within the meaning of section 1983. E.g., id. at 953; Will v. Michigan Dept. of State Police, 491 U.S. 58, 66 (1989). The individual defendants have qualified immunity from the damages claims, given the novelty of the suit.

The law firm has no standing to sue because there is no indication that it has suffered any detriment from the high

price of its phone conversations with its clients; the cost of these phone calls is, at least so far as its counsel is aware, an expense that the firm is reimbursed for by the state or federal government. And the inmate plaintiffs are barred from suing because they have failed to exhaust their administrative remedies, as required by the Prison Litigation Reform Act. 42 U.S.C. sec.1997e(a); Massey v. Wheeler, 221 F.3d 1030, 1034 (7th Cir. 2000); Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 535-38 (7th Cir. 1999); Nyhuis v. Reno, 204 F.3d 65, 71 (5th Cir. 2000); Alexander v. Hawk, 159 F.3d 1321, 1323-28 (11th Cir. 1998); Brown v. Toombs, 139 F.3d 1102, 1104 (6th Cir. 1998) (per curiam). The plaintiffs say they have no such remedies against exorbitant phone bills, but the cases we have cited reject a "futility" exception to the requirement of exhaustion. We have left open the possibility of an exception to the exception for cases in which the only relief sought is monetary and is beyond the power of the prison authorities to give. Davis v. Streekstra, 227 F.3d 759 (7th Cir. 2000). That possible exception is unavailable to these plaintiffs, because they are seeking injunctive as well as monetary relief.

But since these various grounds do not dispose of all the plaintiffs or all the defendants, we proceed to consider whether the district court was right to think that the filed-rate and primary-jurisdiction doctrines place the entire suit outside the jurisdiction of the district court. The filed-rate doctrine, which is based both on historical antipathy to rate setting by courts,deemed a task they are inherently unsuited to perform competently, and on a policy of forbidding price discrimination by public utilities and common carriers, forbids a court to revise a public utility's or (as here) common carrier's filed tariff, which is to say the terms of sale that the carrier has filed with the agency that regulates the carrier's service. AT&T Co. v. Central Office Telephone, Inc., 524 U.S. 214, 223 (1998); Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 126 (1990); Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 577-78 (1981); Cahnmann v. Sprint Corp., 133 F.3d 484, 487 (7th

Cir. 1998); Wegoland Ltd. v. Nynex Corp., 27 F.3d 17 (2d Cir. 1994). A customer or competitor can challenge the tariff before the agency itself, and if disappointed with the agency's response can seek judicial review, 47 U.S.C. sec.sec. 204(a) (2)(C), 402, but it cannot ask the court in any other type of suit (such as this civil rights and antitrust suit) to invalidate or modify the tariff. Nor can it seek damages based on the difference between the actual tariff and a hypothetical lawful tariff. That would require the court to determine the lawful tariff, and this is not regarded as a proper judicial function. Wegoland Ltd. v. Nynex Corp., supra, 27 F.3d at 19-21.

The plaintiffs deny that they are challenging tariffs. They say their objection is to the deals by which the correctional authorities in Illinois have granted exclusive rights to telephone companies in return for what the plaintiffs characterize as kickbacks. They want to dissolve the deals in the hope that competition among phone companies will lead companies to file prison tariffs that have lower rates. They point out that a conspiracy to file (or not file) particular tariffs is not insulated by the filed-rate doctrine from attack under the antitrust laws or other sources of independent rights, Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 422 and n. 28 (1986); United States v. Radio Corp. of America, 358 U.S. 334, 346-47 (1959); Georgia v. Pennsylvania Railroad Co., 324 U.S. 439, 455 (1945); United States v. Pacific & Arctic Ry. & Navigation Co., 228 U.S. 87, 104-05 (1913); City of Mishawaka v. Indiana & Michigan Electric Co., 560 F.2d 1314, 1323 (7th Cir. 1977); Town of Norwood v. New England Power Co., 202 F.3d 408, 419-20 (1st Cir. 2000); Barnes v. Arden Mayfair, Inc., 759 F.2d 676, 679 (9th Cir. 1985), provided that only injunctive relief is sought. Square D Co. v. Niagara Frontier Tariff Bureau, Inc., supra; Keogh v. Chicago & Northwestern Ry., 260 U.S. 156 (1922). Such an attack does not seek to invalidate any tariff, but merely to create an environment in which the regulated firm is more likely to file a tariff that contains terms more favorable to customers. Whether what the plaintiffs are attacking here is

aptly described as a "conspiracy" remains to be considered; provisionally, however, the suit is not barred by the filed-rate doctrine.

The doctrine of primary jurisdiction is not a bar either. The doctrine is really two doctrines. In its central and original form, in which it is more illuminatingly described, however, as "exclusive agency jurisdiction," it applies only when, in a suit involving a regulated firm but not brought under the regulatory statute itself, an issue arises that is within the exclusive original jurisdiction of the regulatory agency to resolve, although it will usually be subject to judicial review. United States v. Western Pacific R.R.,352 U.S. 59, 64 (1956); Cahnmann v. Sprint Corp., supra, 133 F.3d at 487; Advance United Expressways, Inc. v. Eastman Kodak Co., 965 F.2d 1347, 1352-53 (7th Cir. 1992); City of Peoria v. General Electric Cablevision Corp., 690 F.2d 116, 121-22 (7th Cir. 1982). When such an issue arises, the suit must stop and the issue must be referred to the agency for resolution. If the agency's resolution of the issue does not dispose of the entire case, the case can resume subject to judicial review of that resolution along whatever path governs review of the agency's decisions, whether back to the court in which the original case is pending or, if the statute governing review of the agency's decisions designates another court, to that court. Id. at 122; 2 Kenneth Culp Davis & Richard J. Pierce, Jr., Administrative Law Treatise sec. 14.1, pp. 272-80 (3d ed. 1994).

If the plaintiffs in this case wanted to get a rate change, the version of the doctrine that we have described would kick in; but they do not, so it does not. Eventually they want a different rate, of course, but at present all they are seeking is to clear the decks--to dissolve an arrangement that is preventing the telephone company defendants from competing to file tariffs more advantageous to the inmates. We are oversimplifying, because the complaint includes a claim under the Federal Communications Act, 47 U.S. sec.sec. 151 et seq., that the

phone companies charge unreasonably high rates and also engage in rate discrimination. These claims are squarely within the FCC's jurisdiction, but have been forfeited. They are not mentioned in the plaintiffs' opening briefs, and are merely brushed in their reply brief.

The doctrine of primary jurisdiction is sometimes defined quite differently, as a doctrine that allows a court to refer an issue to an agency that knows more about the issue, even if the agency hasn't been given exclusive jurisdiction to decide it. So, for example, we read in National Communications Ass'n, Inc. v. AT&T Co., 46 F.3d 220, 222-23 (2d Cir. 1995), that "the doctrine of primary jurisdiction allows a federal court to refer a matter extending beyond the 'conventional experiences of judges' or 'falling within the realm of administrative discretion' to an administrative agency with more specialized experience, expertise, and insight." This definition obscures the core of the doctrine, described earlier. Cases in which a court refers an issue to an agency because of the agency's superior expertise, such as the case just cited and American Automobile Manufacturers Ass'n v. Massachusetts Dept. of Environmental Protection, 163 F.3d 74, 81, 83 (1st Cir. 1998), rather than because of the agency's jurisdiction, are not felicitously described as cases of primary jurisdiction. They are akin to those Burford abstention cases that like the granddaddy of the line, Burford v. Sun Oil Co., 319 U.S. 315, 332-34 (1943), itself, or the more recent New Orleans Public Service, Inc. v. Council of City of New Orleans, 491 U.S. 350, 361 (1989), concern arcane regulatory issues; or cases in which the court solicits an amicus curiae brief from an interested agency; or cases in which the court has in effect appointed the agency to be a special master-- an analogy embraced in Lodge 1858, American Federation of Government Employees v. Webb, 580 F.2d 496, 508-09 (D.C. Cir. 1978). In such cases, either court and agency have concurrent jurisdiction to decide an issue, or only the court has the power to decide it, and seeks merely the agency's advice. (In the core of the doctrine, in contrast, the

court has jurisdiction of the case, but the agency of the issue.) That model doesn't fit this case either. The FCC has no authority to approve a collusive arrangement among telephone companies; nor is there any indication that it knows anything that would be useful in evaluating the claim of collusion.

Prudently the defendants have not rested wholly on jurisdictional or procedural grounds for the dismissal of this suit, but have argued that the plaintiffs' claims lack merit. They are right. Consider first the claim that exorbitant telephone rates violate the First Amendment. It is true that communications the content of which is protected by the First Amendment are often made over the phone, but no one before these plaintiffs supposed the telephone excise tax an infringement of free speech. Saltzman v. United States, 516 F.2d 891 (9th Cir. 1975) (per curiam). Communications protected by the amendment are also frequently made by printing words on paper, yet no one supposes that the consequence is to bring the corporate income tax, when imposed on manufacturers of paper, within the purview of the First Amendment, or even to forbid taxing those manufacturers more heavily than manufacturers of products that are less important as inputs into the production of communications media. Any regulation direct or indirect of communications can have an effect on the market in ideas and opinions, but that possibility in itself does not raise a constitutional issue. Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575, 581-83 (1983); BellSouth Corp. v. F.C.C., 144 F.3d 58, 69 (D.C. Cir. 1998). Otherwise the entire tax and regulatory operations of American government would be brought under the rule of the First Amendment.

There is no suggestion that the scheme of which the plaintiffs complain is motivated by a desire to limit free speech, as in Grosjean v. American Press Co., 297 U.S. 233 (1936); the plaintiffs themselves contend that it is motivated by pure greed; and of course the telephone rates of which they complain are independent of the protected or unprotected character of the

phone calls being charged for. We note parenthetically that "greed" doesn't seem the right characterization either, considering that prisons are costly to build, maintain, and operate, and that the residents are not charged for their room and board. By what combination of taxes and user charges the state covers the expense of prisons is hardly an issue for the federal courts to resolve.

The case is a bit closer to Minneapolis Star, which invalidated a special tax arbitrarily imposed on newspapers. Yet to extend that decision to the telephone excise tax, or to the "tax" imposed by the contracts attacked in this case, would overlook a vital distinction. The entire content of newspapers, in contrast to telephone calls, is protected by the First Amendment; and so there was in the Minneapolis Star case a gratuitous and potentially substantial, even if not deliberate, impairment of the interests that the amendment is designed to protect. Although the telephone can be used to convey communications that are protected by the First Amendment, that it is not its primary use and it is extremely rare for inmates and their callers to use the telephone for this purpose. Not to allow them access to a telephone might be questionable on other grounds, but to suppose that it would infringe the First Amendment would be doctrinaire in the extreme, United States v. Footman, 215 F.3d 145, 155 (1st Cir. 2000), though the Ninth Circuit disagrees. Johnson v. California, 207 F.3d 650, 656 (9th Cir. 2000) (per curiam). The telephone, and the nation's telecommunications infrastructure more generally, are more commonly used for First Amendment purposes than prison phones are, but the federal courts do not use that fact as the excuse to bring the taxation and regulation of telecommunications under comprehensive judicial surveillance in the name of free speech.

The plaintiffs also argue that the kickback scheme, as they regard it, impairs contracts to which the plaintiffs are parties. No contracts are specified; and in any event a tax, which is what the allegedly exorbitant component of the questioned telephone

rates functionally is, is not an impairment of contracts within the meaning of the Constitution. Barwise v. Sheppard, 299 U.S. 33, 40 (1936); Kehrer v. Stewart, 197 U.S. 60, 70 (1905); North Missouri R.R. v. Maguire, 87 U.S. 46, 61 (1873). The cases that establish this proposition are old, but that is only because it's been a long time since anyone thought to make the argument. And the contention that by charging a high price for phone calls the defendants have taken the plaintiffs' property and must pay just compensation is downright absurd.

There is a little more substance to the argument that the scheme violates the equal protection and due process clauses of the Fourteenth Amendment. We must take the facts pleaded in the complaint as true, and they are that the very high price charged anyone who wants to talk to an inmate over the phone is greatly in excess of any additional cost to the phone companies or the prisons and jails of allowing inmates to make collect calls. Treating what we have called the exorbitant component of the prison inmate tariffs as a tax, we may appear to have a conventional case in which a class of taxpayers complains about a grossly discriminatory tax rate. Allegheny Pittsburgh Coal Co. v. County Commission, 488 U.S. 336, 345 (1989); Metropolitan Life Insurance Co. v. Ward, 470 U.S. 869, 875 (1985); Rinaldi v. Yeager, 384 U.S. 305, 308 (1966); Wallers v. United States, 847 F.2d 1279, 1282 (7th Cir. 1988). But here the fact that it is not a tax but a tariffed rate bites. A claim of discriminatory tariffed telephone rates is precisely the kind of claim that is within the primary jurisdiction of the telephone regulators. The plaintiffs are asking us to compare the rates on inmate calls with rates on comparable calls of other persons; that is what we cannot do but the regulatory agencies can.

The plaintiffs argue that inmates and their families have an interest encompassed by the concept of "liberty" in the due process clause and that the defendants (both the agencies and officials directly subject to the Fourteenth Amendment and the telephone companies, which are liable under section 1983 as their coconspirators, Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970); Tarpley v. Keistler, 188 F.3d 788, 791-92 (7th Cir. 1999)) have arbitrarily deprived them of that interest by preventing competition for inmate phone service. It is conceivable (no stronger statement is possible in the current state of the case law) that the constitutional concept of liberty may encompass a limited right to make or receive prison visits involving family members, Burgess v. Lowery, 201 F.3d 942, 947 (7th Cir. 2000); Froehlich v. Wisconsin, 196 F.3d 800, 801-02 (7th Cir. 1999); Mayo v. Lane, 867 F.2d 374, 375-76 (7th Cir. 1989), and a telephone call is an electronic visit and may be the only form of visit that is feasible if the family lives far from the inmate's prison. But even if this is so, which we needn't decide, the plaintiffs cannot get anywhere with their due process claim. The claim has no procedural dimension; there is no suggestion that the defendants have denied them their due process right to challenge the inmate telephone rates in the regulatory agencies. The claim is substantive, is that the defendants have unreasonably curtailed the liberty of being visited and visiting by denying reasonably priced phone service. And as a substantive claim it cannot fly. It is no different from claiming that a state that raised the gasoline tax and by doing so increased the cost to the plaintiffs of traveling to visit their inmate relatives would be violating the Constitution.

We are also unimpressed by the plaintiffs' antitrust claim. Were they arguing that the defendant phone companies had gotten together to divide the inmate phone market, using state officials as their cat's paws, the defendants, in order to avoid liability, would have to show that the initiative for and control over the scheme resided with the officials, acting in furtherance of a state policy of limiting competition. Southern Motor

Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 56-57 (1985); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105-06 (1980); Hardy v. City Optical Inc., 39 F.3d 765, 768 (7th Cir. 1994); Massachusetts Food Ass'n v. Massachusetts Alcoholic Beverages Control Comm'n, 197 F.3d 560, 563-64 (1st Cir. 1999). There is a bare hint of horizontal agreement--the sort of thing that the Georgia v. Pennsylvania line of cases that we cited earlier holds are not protected from antitrust attack by the filed-rate doctrine--in the allegation of the complaint that the telephone company defendants and the other defendants are acting "jointly and in concert." But the entire thrust of the plaintiffs' argument is that the prisons are principals, not tools; remember, they are said to be motivated by greed, but greed that is institutional rather than personal. Far from being mere agents of the phone companies, the prisons are in the driver's seat, because it is they who control access to the literally captive market constituted by the inmates.

Indeed the plaintiffs' real argument has nothing to do with any horizontal conspiracy; it is rather that a monopolist, namely the State of Illinois (and its subdivisions), exercising as it does an iron control over access to the inmate market, has rented pieces of the market to different phone companies, in much the same way that an airport will charge a high fee to concessionaires eager to sell to the captive market represented by the airline passengers who perforce spend time in the airport. Cf. Elliott v. United Center, 126 F.3d 1003 (7th Cir. 1997). The concessionaires will pass on much of the fee to their customers, who will thus pay a higher than competitive price. States and other public agencies do not violate the antitrust laws by charging fees or taxes that exploit the monopoly of force that is the definition of government. They have to get revenue somehow, and the "somehow" is not the business of the federal courts unless a specific federal right is infringed. Nor do the persons with whom the states contract violate the antitrust laws by becoming state concessionaires, provided those persons do not collude among themselves or engage in other

anticompetitive behavior, of which charging high prices as a state concessionaire is not a recognized species.

Insofar as the plaintiffs' concern is with the purely vertical arrangement between each defendant telephone company and a particular prison or jail, the filed-rate doctrine pops back in as a jurisdictional bar. The vertical agreement is effectively the tariff, that is, the contract between the provider of the regulated service (the phone company) and the customer. Technically, the inmates are the customers; but realistically it is the prisons and jails. The plaintiffs don't want to clear away an obstacle to a voluntarily negotiated lower tariff; they want a lower tariff.

The dismissal of the plaintiffs' federal claims must be affirmed, though on the merits rather than (with the exception of the equal protection claim, which is within the scope of the doctrine of primary jurisdiction in its core sense of exclusive agency jurisdiction to decide an issue, and the vertical dimension of the antitrust claim, which is barred by the filed-rate doctrine) on jurisdictional grounds. Since all the plaintiffs' federal claims have fallen out well before trial and their state claims are not even mentioned in the district court's opinion, we direct that court to relinquish jurisdiction over the state claims. 28 U.S.C. sec. 1367(c)(3). Doubtless the court would have done that on its own had it not thought the entire case outside its jurisdiction, which is why it had no occasion even to mention those claims. Modified and Affirmed.

APPENDIX D

In the United States Court of Appeals
For the Seventh Circuit

May 29, 2001

Before

Hon. Richard A. Posner, Circuit Judge

Hon. Frank H. Easterbrook, Circuit Judge

Hon. Terence T. Evans, Circuit Judge

No. 00-1777

Katie Arsberry, Phyllis Brooks, Jeanne Gammon, et al.,

Plaintiffs-Appellants,

v.

State of Illinois, County of Cook, Ameritech Services, Incorporated, et al.,

Defendants-Appellees.

Appeal from the United States District Court of the Northern District of Illinois, Eastern Division

No. 99 C 2457

William J. Hibbler, Judge

ORDER

On consideration of the petition for rehearing and petition for rehearing *en banc* filed on April 2, 2001 by plaintiffs-appellants and on May 7, 2001 defendants-appellees filed an answer. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing *en banc*. The petition is therefore DENIED.

---

* Hon. Illana Diamond Rovner and Hon. Ann Claire Williams did not participate in the consideration of the petition.

APPENDIX E

United States Constitution

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment XIV, Section 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX F

42 U.S.C. § 1983 Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

No. 01-352

IN THE

Supreme Court of the United States

KATIE ARSBERRY, *et al.*,

Petitioners,

v.

STATE OF ILLINOIS, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR TELEPHONE COMPANY RESPONDENTS

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RULE 29.6 STATEMENTS

Respondent Ameritech Services, Inc. is a wholly owned subsidiary of Ameritech Corporation.

Respondent AT&T Corporation has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondent Consolidated Communications Public Services, Inc. is a subsidiary of Consolidated Communication, Inc. and McLEODUSA, Incorporated, and no publicly held company owns 10% or more of its stock.

Respondent Evercom Systems, Inc. as successor in interest to Invision Telecom is a subsidiary of Evercom, Inc., and no publicly held company owns 10% or more of its stock.

Respondent MCI WORLDCOM Network Services, Inc. (formerly known as MCI Telecommunications Corporation), is a wholly owned, indirect subsidiary of WorldCom, Inc. WorldCom, Inc. is a publicly traded company on the NASDAQ National Market under the symbols "WCOM" and "MCIT." WorldCom, Inc. has no parent corporations. No publicly held company owns 10% or more of WorldCom, Inc.'s stock. WorldCom, Inc. owns controlling interests in Embratel Participacoes, S.A., and Digex, Incorporated, both of which issue shares to the public.

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This petition for a writ of certiorari rests on the false premise that the Seventh Circuit held below that prison and jail "inmates possess no First Amendment right to use the telephone." Pet. at 9. The Seventh Circuit did not so hold. Rather, the Seventh Circuit ruled that the telephone systems selected by Illinois correctional authorities that result in more costly calls do not impermissibly infringe on inmates' First Amendment and other constitutional rights — a decision fully consistent with other federal authority.

Petitioners attempt to create the appearance of a circuit split by focusing on one sentence in the Seventh Circuit's opinion, taken wholly out of context. There is no circuit split. The Seventh Circuit's decision in *Arsberry* comports with this Court's decisions in *Turner v. Safley*, 482 U.S. 78 (1987) and *Shaw v. Murphy*, 121 S. Ct. 1475 (2001), as well as the many federal decisions holding that restricted access prison telephone systems do not violate the constitutional rights of inmates or the people they call.

The petition asks this Court to find that the Seventh Circuit has drastically departed from settled First Amendment precedent. That is simply untrue. The Seventh Circuit held, correctly, that petitioners' First Amendment rights have not been violated. There is no compelling reason to grant the petition for a writ of certiorari, and the petition should be denied.

COUNTERSTATEMENT OF THE CASE

Respondents provide the Court with the following additional facts material to consideration of the questions presented.

The State of Illinois and Cook, DuPage, and Kane Counties administer prisons and jails within Illinois. The State and the counties have adopted regulations to facilitate the orderly operation of those facilities and to ensure the safety and security of inmates, prison and jail employees, and the public. Among other things, the State and the counties restrict the means by which inmates communicate by telephone. Record in the Seventh Circuit ("R.") 39 at 1, 3, 6-7, 19.

Inmate misuse of telephones is widespread. R. 40, Ex. 1 at 2-3 of Exec. Sum. The United States Department of Justice, Office of Inspector General reported in 1999 that inmates frequently attempt to use telephones to commit fraud, threaten witnesses, conduct criminal activity including the attempted murder of witnesses and judges, and obtain contraband while behind bars. *Id.* Inmate use of telephones to operate wide-ranging criminal enterprises has been reported by prison officials, law enforcement personnel, prosecutors, and inmates themselves. *Id.*

To avoid the potential misuse of telephones, the State and the counties restrict inmates to making collect calls using a provider approved by the correctional authorities. *See, e.g.*, R. 39 at 1, 3, 6-7, 19. Illinois Department of Corrections regulations prohibit inmates from calling "1-800" numbers, emergency numbers (*e.g.*, "911"), or directory assistance, as well as numbers belonging to parolees, ex-offenders, or numbers "restricted for legitimate penological reasons, including security and order." Ill. Admin. Code tit. 20, § 525.150. The regulations also forbid inmates from dialing long-distance carriers, arranging to have their calls forwarded, or entering onto a conference call. *Id.* Inmates' calls may be monitored. *Id.*

The State and the counties have entered into contracts with telephone companies to provide collect-calling services for inmates. The telephone companies comply with the Illinois regulations and the State's and the counties' requirements by implementing specialized, automated security features that are not found in the general public phone system. *See, e.g.*, R. 40, Ex. 3 at A000023. For example, certain inmate phone systems allow prison administrators to monitor and control calls based on the duration of the call, time of day, number of calls placed per individual, and telephone number called. *Id.* The system also provides prison administrators with the capacity to block restricted calls, monitor and record phone conversations, and generate call-detail reports. *Id.* The rates that the telephone companies charge for inmate collect calls are comparable to, and in some instances actually lower than, the rates they charge the public for automated operator-assisted collect calls from a payphone. R. 40, Ex. 2-6; R. 36 Ex. A-D.

Inmates who do not wish, or who are not able, to make collect calls have other communications options. R. 31 ¶ 68. They are free to send mail to and receive mail from almost anyone they choose, and may receive visitors. Ill. Admin. Code tit. 20, § 525.120.

Petitioners sued five telephone companies, the State of Illinois, the Director of the Illinois Department of Corrections, the Director of Central Management Services for the State of Illinois, and Cook, DuPage, and Kane Counties. Petitioners complained that they are only able to make collect calls, are unable to take advantage of various telephone calling options available to the general public and, as a result, have been forced to pay allegedly excessive rates.

The district court dismissed petitioners' complaint in its entirety, ruling that the claims were barred by the filed rate doctrine and within the primary jurisdiction of federal and state regulatory agencies. The Seventh Circuit affirmed the dismissal of petitioners' claims in their entirety, holding, *inter alia*, that the restricted access telephone systems at issue do not violate petitioners' rights under the First Amendment.

REASONS FOR DENYING THE WRIT

I. THE SEVENTH CIRCUIT DID NOT RULE THAT PRISONERS HAVE NO FIRST AMENDMENT RIGHT TO USE A TELEPHONE, AND DID NOT CREATE A CIRCUIT SPLIT.

A. The Seventh Circuit Did Not Pronounce A New Rule Regarding Prisoners' First Amendment Rights.

Petitioners have distorted the Seventh Circuit's holding to create the false impression that this Court must intervene to address a significant departure from First Amendment precedent. Petitioners rely on the Seventh Circuit's discussion of the First Amendment rights of inmates and people they call, in particular the court's statement that "[n]ot to allow [inmates] access to a telephone might be questionable on other grounds, but to suppose that it would infringe the First Amendment would be doctrinaire in the extreme." Pet. at 8. Contrary to petitioners' portrayal, this statement does not mean that "the court below squarely held that prisoners have no [First Amendment] rights." *Id.* at 12.

First, the Seventh Circuit's actual ruling was that costly telephone use — or, in the Seventh Circuit's language,

imposition of a "tax" on inmates' telephone use — is not actionable under the First Amendment. This ruling does not "depart[] from this Court's prior First Amendment decisions," as petitioners suggest. Pet. at 13. Indeed, the language petitioners cite is found in the middle of the panel's discussion of *Minneapolis Star*, in which this Court held that a use tax on the cost of paper and ink products violated the First Amendment because it impermissibly burdened newspapers' freedom of press. *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 591 (1983).

The Seventh Circuit distinguished *Minneapolis Star*, reasoning that the special concerns present in that case concerning the political process and the Framers' desire to ensure that any differential treatment of the press were not at issue in *Arsberry*. Pet. App. at 49. Thus, the fact that inmates want to use the telephone to communicate with people outside the prison is not an "excuse for bringing the taxation and regulation of telecommunications under comprehensive judicial surveillance in the name of free speech." *Id.*

Viewed in context, the statement petitioners challenge simply reflects the panel's holding that more expensive telephone rates for inmates and people they call do not rise to the level of a First Amendment violation. Contrary to *Minneapolis Star*, there are no special circumstances here that render the tax unduly burdensome in violation of the First Amendment.

Second, the Seventh Circuit expressly acknowledged that "communications the content of which is protected by the First Amendment are often made over the phone." Pet. App.

at 48. That the telephone can be used to convey constitutionally protected communications, however, did not compel the Seventh Circuit to accept petitioners' more extreme view of "the telephone excise tax [as] an infringement of free speech." *Id.* To the contrary, the Seventh Circuit noted, "[a]ny regulation direct or indirect of communications can have an effect on the market in ideas and opinions, but that possibility in itself does not raise a constitutional issue." *Id.* (citing, *inter alia*, *Minneapolis Star*, 460 U.S. at 581-83). "Otherwise, the entire tax and regulatory operations of American government would be brought under the rule of the First Amendment." *Id.*

Third, left unmentioned in the certiorari petition is the Seventh Circuit's observation that petitioners themselves alleged that greed, not any desire to limit free speech, was the motivation behind the collect-only telephone system — thus taking the case outside the purview of *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). Pet. App. at 48-49. The Seventh Circuit noted that "greed" appeared to be a curious accusation in this context, "considering that prisons are costly to build, maintain, and operate, and that the residents are not charged for their room and board." Pet. App. at 49. In this regard, the panel recognized that "[b]y what combination of taxes and user charges the state covers the expense of prisons is hardly an issue for the federal courts to resolve." *Id.* If the Seventh Circuit had actually held that prisoners and those with whom they communicate possess no First Amendment rights, then the panel would have had no reason to address the motivation underlying the challenged conduct in dismissing petitioners' First Amendment claim.

Fourth, petitioners fail to inform the Court that the telephone company respondents have never argued that

inmates have no First Amendment right to use a telephone. Respondents have always recognized that right, as limited by the principles that the Supreme Court expressed in *Turner v. Safley* and like case law. The Seventh Circuit's holding that petitioners' First Amendment rights were not violated responded to the arguments respondents advanced below.

In sum, the Seventh Circuit did not make any blanket pronouncement that prisoners have no First Amendment right to telephone access.

B. The Seventh Circuit's Holding Is Consistent With Other Circuits.

Petitioners attempt to isolate the Seventh Circuit by arguing that other circuits have held that inmates have a First Amendment right to telephone access. Pet. at 13-16. In their zeal to conjure a circuit split, petitioners overlook the holdings of the cases they cite. *Every one* of the prisoner telephone access cases petitioners present to this Court is consistent with the Seventh Circuit's holding in *Arsberry*:

- The three Ninth Circuit cases petitioners cite all affirmed dismissal of inmates' First Amendment claims because the right to telephone access is subject to rational limitations. *Johnson v. California*, 207 F.3d 650, 656 (9th Cir. 2000); *Keenan v. Hall*, 83 F.3d 1083, 1092 (9th Cir. 1996); *Strandberg v. City of Helena*, 791 F.2d 744, 747-48 (9th Cir. 1986). *See* Pet. at 14.

- In *Washington v. Reno*, 35 F.3d 1093, 1100, 1104 (6th Cir. 1994), the Sixth Circuit held that plaintiffs were unlikely to succeed on their First Amendment

claim that the prison phone system violated their rights of free expression and association. *See* Pet. at 14.

- The Eighth Amendment cases petitioners cite likewise rejected First Amendment claims. *Benzel v. Grammar*, 869 F.2d 1105, 1109 (8th Cir.), *cert. denied*, 493 U.S. 895 (1989) (rejecting First Amendment claims because internal security and rehabilitation concerns justified prison telephone policy); *McDonald v. Armontrout*, 908 F.2d 388, 392 (8th Cir. 1990) (restricting inmates to one hour per week for personal telephone calls did not violate First Amendment). *See* Pet. at 14.

- The same is true with respect to petitioners' Tenth Circuit cases. *Young-Bey v. Swanson*, 246 F.3d 684, 2001 WL 179798, *2 (10th Cir. Feb. 23, 2001) (dismissing First Amendment claims for failure to state a claim); *Pope v. Hightower*, 101 F.3d 1382, 1385 (11th Cir. 1996) (no First Amendment violation because telephone restrictions were reasonably related to legitimate penological objectives). *See* Pet. at 14-15.

If any doubt remained about the Seventh Circuit's position on prisoners' rights vis a vis other circuits, the Seventh Circuit extinguished that doubt with its decision in *Israel v. Cohn*, 248 F.3d 1158, 2001 WL 300710 (7th Cir. March 27, 2001), issued approximately one week after *Arsberry*. Judge Posner, who wrote the *Arsberry* opinion, was on the *Israel* panel. In *Israel*, the Seventh Circuit affirmed dismissal of an inmate's First Amendment challenge to a telephone policy that required pre-approval of telephone

numbers inmates wished to call. *Id.* at *3. The Seventh Circuit evaluated the policy under the standard set forth in *Turner v. Safley* — the standard that petitioners claim the Seventh Circuit abandoned. *Id.* at *1. In support of their decision, the Seventh Circuit cited *Thornburgh v. Abbott*, 490 U.S. 401 (1989), *Pope v. Hightower*, 101 F.3d 1382 (11th Cir. 1996), *Washington v. Reno*, 35 F.3d 1093 (6th Cir. 1994), *Benzel v. Grammar*, 869 F.2d 1105 (8th Cir. 1989), *Strandberg v. City of Helena*, 791 F.2d 744 (9th Cir. 1986), *Lopez v. Reyes*, 692 F.2d 15 (5th Cir. 1982), and *Shimer v. Washington*, 100 F.3d 506 (7th Cir. 1996) — cases that petitioners claim the Seventh Circuit ignored. *Id.* at *1-2.

Finally, the Seventh Circuit cited *Arsberry*, and the particular language in *Arsberry* that petitioners challenge, as part of its *Turner v. Safley* analysis. *Id.* at *2. The *Israel v. Cohn* decision makes clear that the Seventh Circuit stands in line with the many other courts across the country that have recognized inmates do have First Amendment rights, but those rights may be limited by correctional authorities' policies that are reasonably related to legitimate penological interests.

II. PETITIONERS DO NOT STATE A VALID FIRST AMENDMENT CLAIM.

The Court need go no further. It should deny the petition for a writ of certiorari because there are no compelling reasons to grant it: the Seventh Circuit has not entered a decision that conflicts with the decision of another United States Court of Appeals on the same important matter, and the Seventh Circuit has not decided an important federal question in a way that conflicts with the relevant decisions of this Court. Courts across the country have consistently

reached the same conclusion that the Seventh Circuit reached in this case: restricted access prison telephone systems that result in costlier telephone calls do not violate anyone's constitutional rights. There are no burning, unresolved issues that should compel the Court to grant the petition.

A. Petitioners' First Amendment And Other Constitutional Claims Fail Under *Turner v. Safley*.

In *Turner*, this Court firmly established the standard for reviewing a prison regulation: "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." 482 U.S. at 89. "Legitimate penological interests" include, for example, deterrence of crime and institutional security. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987). The *Turner* standard is "not demanding" and is "less restrictive than the test ordinarily applied to the alleged infringement of fundamental constitutional rights." *Young v. Lane*, 922 F.2d 370, 375 (7th Cir. 1991). Federal courts defer even more to prison authorities when a state penal system is involved. *Turner*, 482 U.S. at 85. The *Turner* standard applies with equal force to the constitutional claims of persons outside the prison environment who are affected by prison regulations. *Thornburgh v. Abbott*, 490 U.S. 401, 411 n.9 (1989) (*Turner* standard applies to both inmates and outsiders who interact with inmates).

Courts have had no difficulty applying the *Turner* standard to prison rules related to telephone use. They have consistently held that inmates do not have a constitutional right to use prison telephones on their own terms. *See, e.g., Washington*, 35 F.3d at 1100 (quoting *Benzel*, 869 F.2d at 1108 ("A prisoner has no right to unlimited

telephone use.")). Rather, "a prisoner's right to telephone access is 'subject to rational limitations in the face of legitimate security interests of the penal institution.' " *Id.* (citation omitted). Prison administrators may decide the exact nature of telephone service to be provided to inmates, as long as any restrictions are reasonably related to legitimate penological interests. *Washington*, 35 F.3d at 1100; *see also Turner*, 482 U.S. at 89.

Courts repeatedly have determined that prisons restrict inmates' telephone access for security reasons and to prevent telephone fraud. *Washington*, 35 F.3d at 1100; *Pope*, 101 F.3d at 1385; *Benzel*, 869 F.2d at 1108-09; *Arney v. Simmons*, 26 F. Supp. 2d 1288, 1293-94 (D. Kan. 1998) ("In many court opinions, it appears to be assumed that a legitimate penological purpose is served by restrictions on telephone access. . . . In this court's opinion such a common sense assumption is warranted."). They repeatedly have held that these restrictions help ensure that inmates do not harass outsiders, including victims and witnesses, or conduct illegal activity by telephone. *Carter*, 924 F. Supp. at 910; *see also Clark v. Plummer*, 1995 WL 317015, *1 (N.D. Cal. May 18, 1995). Collect-only inmate telephone systems, in particular, have repeatedly survived constitutional challenges.[1]

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1. *Johnson*, 207 F.3d at 650; *Daleure v. Kentucky*, 119 F. Supp. 2d 683 (W.D. Ky. 2000), *app. dismissed on other grounds*, 2001 WL 1230558 (6th Cir. Oct. 17, 2001) (court of appeals lacked jurisdiction because district court failed to explain determination to enter judgment on fewer than all claims under Fed. R. Civ. P. 54(b)); *Brock v. Bishop Robinson*, No. S-99-3129 (D. Md. Oct. 25, 1999), *aff'd sub nom Lloyd v. Robinson*, 217 F.3d 839 (4th Cir. 2000); *Keeby v. Indiana*, No. 3:99-CV-0277 (N.D. Ind. June 17, 1999); *Joost v. Cornell Corrections, Inc.*, 1998 WL 939531 (D.R.I. Dec. 11, 1998); (Cont'd)

Because other courts have repeatedly recognized that restricted access telephone systems advance a prison's interest in security, there appears to be little need for the Court's guidance.[2]

B. The Restricted Access Telephone Systems Are Content-Neutral And Have No Impact On Other Means Of Communication.

This Court also already has made clear that inmates' First Amendment rights are not as extensive as non-inmates' rights: "[M]aintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of . . . convicted prisoners. . . ." *Bell v. Wolfish*, 441 U.S. 520, 546 (1979).

Where a plaintiff alleges that a prison restriction violates the First Amendment, this Court has instructed courts to consider, in particular, whether the restriction is content-neutral, and whether there are alternative means of expression

(Cont'd)
Arney, 26 F. Supp. 2d at 1288; *Carter*, 924 F. Supp. at 903; *Demits v. Tuso*, 1996 WL 33972 (N.D. Cal. Jan. 17, 1996); *Clark*, 1995 WL 317015; *Levingston v. Plummer*, 1995 WL 23945 (N.D. Cal. Jan. 9, 1995); *Loden v. Peters*, 1995 WL 89951 (N.D. Ill. March 1, 1995); *McNeil v. Springborn*, 1994 WL 48611 (N.D. Ill. Feb. 16, 1994); *Adams v. McGee*, 1994 WL 544381 (D. Or. Sept. 26, 1994); *Allen v. Josephine County*, 1993 WL 11948 (D. Or. Jan. 13, 1993), *aff'd*, 15 F.3d 1082 (9th Cir. 1994); *Lane v. Hutcheson*, 794 F. Supp. 877 (E.D. Mo. 1992); *Wooden v. Norris*, 637 F. Supp. 543 (M.D. Tenn. 1986).

2. No evidentiary hearing was necessary to decide petitioners' First Amendment claims under *Turner v. Safley*. *Spies v. Voinovich*, 173 F.3d 398, 403-04 (6th Cir. 1999).

available. *Bell*, 441 U.S. at 551; *Pell v. Procunier*, 417 U.S. 817, 823-24 (1974) (prison-visitation restrictions do not violate First Amendment where other means of communication, such as mail, remain available). The fact that the prison's chosen communication system may be more expensive or less convenient than other methods "does not fundamentally implicate free speech values." *Jones*, 433 U.S. at 130-31.

Courts have had no difficulty applying this Court's standards to the restricted access prison telephone systems challenged here. The collect-only systems do not restrict speech or association based on the substance of their communications: the systems are content-neutral. *Arney*, 26 F. Supp. 2d at 1293. Moreover, telephone calls are not petitioners' only means of exercising their First Amendment rights. Inmates may send mail to and receive mail from almost anyone they choose. Inmates also may receive visitors, including clergymen and attorneys, during regular or extended visiting hours. The availability of these alternatives undermines petitioners' First Amendment claims. *Pope*, 101 F.3d at 1385 (telephone restrictions do not violate inmate's First Amendment rights because "he could receive visitors and correspond with virtually anyone he wished"); *Benzel*, 869 F.2d at 1109 (no First Amendment violation where telephone policy only limited inmates' right to communication by telephone, not their mail or visiting privileges); *Wooden*, 637 F. Supp. at 555 (collect-only system did not violate First Amendment rights of inmates or their families where visitation and mail privileges were unaffected).[3]

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3. *See also Pell*, 417 U.S. at 828 n.5 (the fact that inmates may be inarticulate or illiterate does not foreclose mail as a legitimate

(Cont'd)

With remarkable consistency, courts have determined that restricted access prison telephone systems are content-neutral and are rationally related to legitimate penological interests. Moreover, they have determined that such systems are merely one of several means by which inmates may communicate with their families. There appears to be no genuine debate among lower courts that the systems do not violate petitioners' First Amendment rights. There simply is no issue presented that justifies granting the petition.

(Cont'd)
alternative means of communicating from prison, because an illiterate inmate may ask others to help him write a letter to someone outside the prison); *Arney*, 26 F. Supp. 2d at 1294 (plaintiffs' allegations that they were unable to write to and receive letters from people outside the prison were "unconvincing" and insufficient to support First Amendment claim); *Carter*, 924 F. Supp. at 911 (plaintiffs' assertion that some inmates or outsiders are illiterate is irrelevant to constitutional inquiry).

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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No. 01-352

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 2001

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Petitioners,

-against-

State of Illinois, Michael S. Schwarz, Director, Central Management Services, Donald N. Snyder, Director, Illinois Department of Corrections, Cook County, Dupage County, Kane County, Ameritech Services, Inc., AT&T, Invision Telecom, MCI Telecommunications Corporation, and Consolidated Communications Public Services, Inc.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOR THE SEVENTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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First Amendment to the United States Constitution ..... passim

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioners Katie Arsberry, *et al.* respectfully submit this reply brief in further support of their petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in *Arsberry v. State of Illinois*, 244 F.3d 558 (7th Cir. 2001).

ARGUMENT

Petitioners have previously shown that the Seventh Circuit's *Arsberry* decision, holding that inmates have no First Amendment rights to use the telephone, completely confounds this Court's First Amendment jurisprudence, and squarely conflicts with the decisions of all other circuit courts of appeals that have addressed the issue and acknowledged the First Amendment rights of prisoners to speak with their families via the telephone. The Seventh Circuit's reasoning is premised – either implicitly or explicitly – on four "rules" of the court below's own making: (i) that private conversations are generally unworthy of First Amendment protection; (ii) that the First Amendment generally only protects speech on matters of public concern; (iii) that the opportunity to write letters and have visitors extinguishes altogether any First Amendment rights that inmates and their families may have in other means of communication with each other; and (iv) that restrictions on inmate telephone access, no matter how severe and no matter how unrelated to valid penological interests, do not implicate the First Amendment rights of inmates' family members. These "rules" are completely at odds with this Court's First Amendment jurisprudence.

In their opposition to this petition, respondents attempt to transform the critical sentence in the faulty opinion below from the central holding of the case (on inmates' First Amendment rights) into mere dictum. This, however, utterly distorts the critical passages in the *Arsberry* decision. Try as they might, respondents cannot show that the Seventh Circuit did not mean what it plainly said when it stated that inmates have no First Amendment rights to use the telephone.

ARGUMENT

I. THE SEVENTH CIRCUIT SQUARELY HELD THAT INMATES HAVE NO FIRST AMENDMENT RIGHTS TO USE THE TELEPHONE

Respondents urge the Court (at 4) to ignore the Seventh Circuit's remarkable statement that "not to allow [inmates] access to a telephone might be questionable on other grounds, but to suppose that it would infringe the First Amendment would be doctrinaire in the extreme." (A49) That statement, however, cannot be ignored because it is the basis on which the court below rejected petitioners' First Amendment claim. While it is true that the Seventh Circuit ruled that costly inmate telephone service is not actionable under the First Amendment (Resp'ts Br. at 4-5), that ruling rested entirely on the court below's view that inmates have no First Amendment rights to use the telephone. That view is as much a part of the holding in the case as is the ultimate result. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 68 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound").

Contrary to respondents' assertion (at 5), the Seventh Circuit did not distinguish *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 591 (1983), on the grounds that the "special concerns" present there regarding the political process and differential treatment of the press are lacking in this case. Indeed, the court below never even mentioned those concerns. Rather, the Seventh Circuit found *Minneapolis Star* inapposite because, in the court below's view, the content of inmate telephone calls, unlike the content of newspapers, is very rarely entitled to

First Amendment protection. (A49) To be sure, the Seventh Circuit acknowledged that "the telephone can be used to convey communications that are protected by the First Amendment." (A49) Resp'ts Br. at 5. The court below, however, also stressed -- in the very same sentence -- that "it is extremely rare for inmates and their callers to use the telephone for this purpose." (A49)

Respondents argue (at 6) that the Seventh Circuit's discussion of the motivation underlying the adoption of the inmate telephone system (and commission policy) at issue here necessarily implies the court below's recognition of inmates' First Amendment rights to use the telephone. To the contrary, the Seventh Circuit discussed the issue of motivation for the sole purpose of distinguishing this case from *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), *not* because it assumed that inmates have First Amendment rights to use the telephone. (A48-49) Indeed, in the very next paragraph of its opinion, the Seventh Circuit, as already noted, expressly stated that "it would be doctrinaire in the extreme" to suppose that inmates have such First Amendment rights. (A49)

If the Seventh Circuit had recognized that inmates have First Amendment rights to use the telephone, as respondents argue (at 6), it surely would have proceeded to analyze the constitutionality of the inmate telephone system (and commission policy) under the analysis set forth in *Turner v. Safley*, 482 U.S. 78 (1987), just as respondents purport to do (at 9-12) in their brief to this Court. The court below however, never even mentioned, let alone discussed, *Turner*. The only conclusion that can be drawn from this omission is that the Seventh Circuit decided that inmates have no First Amendment rights to use the telephone. This was

plainly the determinative factor in the court below's decision not to apply the *Turner* analysis.

Finally, it is utterly irrelevant that Respondents did not argue below that inmates have no First Amendment rights to use the telephone. Resp'ts Br. at 6-7. The critical fact is that this is what the Seventh Circuit held.

II. THE SEVENTH CIRCUIT'S DECISION CREATES A SPLIT AMONG THE CIRCUITS

To be sure, every other circuit to consider First Amendment challenges to restrictions on inmate telephone service, in the final analysis, has rejected those specific challenges. Resp'ts Br. at 7-9. In doing so, however, all of these circuits recognized that inmates have some First Amendment rights to use the telephone. *See, e.g., Johnson v. California*, 207 F.3d 650, 656 (9th Cir. 2000) ("prisoners have a First Amendment right to telephone access," subject to reasonable security concerns); *Benzel v. Grammar*, 869 F.2d 1105, 1108 (8th Cir.) ("prison inmates have a [First Amendment] right to use the telephone for communication with relatives and friends," subject to reasonable security concerns), *cert. denied*, 493 U.S. 895 (1989); *Washington v. Reno*, 35 F.3d 1093, 1099-1100 (6th Cir. 1994) (prisoners retain the First Amendment rights to communicate with family and friends" via the telephone). Moreover, these circuits rejected the First Amendment challenges to restrictions on inmate telephone service only after they applied the *Turner* analysis. The Seventh Circuit thus stands alone, and in direct conflict with the great majority of circuits, in refusing to recognize that inmates have First Amendment rights to use the telephone.

Respondents (at 8-9) cite *Israel v. Cohn*, 248 F.3d 1158, 2001 WL 300710 (7th Cir. March 21, 2001) as support for their position that the Seventh Circuit has not created a conflict among the circuits. As Respondents concede (at 9), however, the Seventh Circuit in *Israel v. Cohn* cited approvingly the very language in *Arsberry* that places the Seventh Circuit in direct conflict with other circuits. Moreover, even assuming *arguendo* that the Seventh Circuit's decision in *Israel v. Cohn* implicitly rejects *Arsberry*'s reasoning, that decision is unreported and thus entitled to *no precedential value* under the Seventh Circuit's own rules. 7th Cir. R. 53(b)(4). Finally, the mere fact that a conflict may exist *within* the Seventh Circuit on whether inmates have First Amendment rights to use the telephone does not lessen the conflict *among* its sister circuits on that issue.

III. PETITIONERS HAVE STATED A VALID FIRST AMENDMENT CLAIM

Petitioners have previously shown that the inmate telephone system at issue here is subject to scrutiny, *not* under the deferential *Turner* analysis, but rather under traditional intermediate scrutiny because the system reflects a purely "budgetary" choice that does not implicate prison security, control of inmate behavior, or the internal prison environment and regime. Pet. at 20. Respondents do not even mention, let alone address, this part of petitioners' argument.

Contrary to respondents' assertion (at 10-12), the inmate telephone system at issue here even fails to survive scrutiny even under the deferential *Turner* analysis. Respondents, for example, entirely ignore the commission policy, no doubt because they cannot show a "valid rational

connection" between that policy and legitimate penological objectives. *Turner*, 482 U.S. at 90.

To be sure, inmates generally may send mail to their families, friends, and loved ones on the outside, and vice-versa, and inmates generally may receive visitors during regular or extended visiting hours. Resp'ts Br. at 13. This Court has made clear, however, that the availability of alternative means of communication, though a relevant factor, "does not extinguish altogether" an inmate's "constitutional interest" in other means of communication. *Pell v. Procunier*, 417 U.S. 817, 823-24 (1974). The same can be said of inmates' families, friends, and loved ones. For those of petitioners -- the elderly and ill -- who cannot read or write letters or leave the home, the telephone is the only means of communication with family members, friends, or loved ones in prison. (A18-19). In asserting (at 13) that the availability of letters and visits undermine the First Amendment claims here, respondents entirely fail to address -- as did the court below -- this group of petitioners' claims.[1]

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[1] As petitioners have previously observed (Pet. at 18-19), the inmate telephone system and the commission policy at issue here implicate the First Amendment rights of *both* inmates *and* those whom they call. This Court has made clear that the rights of those on the outside who wish to communicate with inmates are wholly independent and not derivative of an inmate's rights. *See Procunier v. Martinez*, 416 U.S. 396. 409 (1974).

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari, the petition should be granted.

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